IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 68 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and Sd/-
MR.JUSTICE M.C.PATEL Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? yes

2. To be referred to the Reporter or not? yes

J

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge? 3 to 5 No

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1. JANARDAN BADRINARAYAN PATEL

2. Shardaben ,wd/o Badrinarayan Jamnadas (Appellant No.2, Shardaben, wd/o Badrinarayan Jamnadas, since deceased by her heirs and legal representative).

2.1 Janardhan Badrinarayan Patel

vs.

1. Sheth Ambalal Himatlal (Deleted) (since deceased, following trustees are brought on record):

1/1 Shri Arunbhai K. Trivedi,

1/2 Shri Anand Chandrakant,

1/3 Shri Thakorebhai,

2. Sheth Chandrakant Motilal,

3. Kesuprasad Motilal Jani (Since deceased deleted)
4. Manoramaben D/o Badrinarayan Patel,
5. Premila, D/o Badrinarayan Patel,
6. Vadilal Lallubhai Patel,
7. Shantilal Lallubhai Patel.

Appearance:
MR S.B.VAKILfor Appellant.
MR GIRISH D BHATT for Respondent Nos 1/1,1/2 and 2
MR DN PANDYA for Respondent No.1/3,
Rest served.

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE M.C.PATEL
Date of decision: 3/12/1998

ORAL JUDGEMENT(Per R.K.Abichandani,J.)

The appellants challenge the judgment and order dated 25.11.1978 passed by the City Civil Court, Ahmedabad, granting probate of the will, Exh.77, dated 1.5.1967, executed by Bai Chandan, daughter of Patel Somnath Bhudardas, and widow of Badrinarayan Jamnadas, to the executors of the will, who were the original respondents Nos.1,2 and 3 in this appeal. During the pendency of this appeal, the appellant No.2, Shardaben, who was the other widow of Badrinarayan, died, and as per the court's order dated 25.6.1987, passed on Civil Application No.1799 of 1986, her son Janardhan, the appellant No.1 was also shown as her heir. The original respondent No.1, Sheth Ambalal Himatlal, the original respondent No.3, Kesuprasad Motilal Jani, have also died during the pendency of the appeal, and as per the order made in Civil Application No.3926 of 1994 on 27.9.1994, the respondents No.1/2, Shri A.K. Trivedi; 1/2, Shri Anand Chandrakant, and 1/3, Shri Thakorbhai, were brought on record as the newly appointed "trustees", as per the terms of the will.

The appellant No.1, Janardhan Badrinarayan Patel, was the step-son of the testatrix, and the respondent No.4, Manoramaben, and the respondent No.5, Premila, her step-daughters. Respondents Nos. 6 and 7, Vadilal and Shantilal, were the cousin brothers of the testatrix.

2.1 A petition for probate, being Misc. Application No.552/70, of the will in question was filed on 21.10.1970, under Rule 165 of the Ahmedabad City Civil Court Rules, 1961, in the City Civil Court, Ahmedabad, stating that the applicants, Sheth Ambalal Himatlal, Sheth Chandrakant Motilal Jagabhaivala and Kesuprasad Motilal Jani were the executors named in the will of Chandanben and they would faithfully administer the property. A certified photo copy of the will was produced along with the application stating that the original will be produced during the hearing. The affidavits of the attesting witnesses, Chandulal Jagannath and Chimanlal Jivanlal were filed along with the application, as required by law. In that probate application, the stepson of the testatrix, Janardhan put forth his objections at Exh.31. The said Caveator alleged that the will was false and got up and that at the relevant time, when it purports to have been executed by Chandanben, she was not in a sound disposing state of mind and that she was completely overpowered by the applicants and had acted under undue influence. It was also alleged that the will was not executed by deceased Chandanben and, even if proved, it would not be operable, since it was vague, uncertain and wanting in necessary particulars. It was also alleged that Chandanben was keeping ill-health due to old age and due to cataract in both the eyes, she had nearly lost her vision. It was contended that the testatrix did not know and could not consider the implications of the dispositions made in the will. It was also alleged that the original applicants were co-trustees with the deceased in several trusts and therefore they had taken advantage of their position and exercised undue influence over the deceased in getting the will executed. It was further alleged that the will was unnatural and was created to defeat the interest of the Caveator, his real mother and sisters.

2.2 The Caveator, Manoramaben, who is the present respondent No.4, objected against the will by her affidavit Exh.33, which she later adopted as her written statement, by filing note Exh.21 in the civil suit, into which the said probate application was converted because of the contest, contending that the testatrix was, at the time of the alleged execution of the will, an old lady of feeble mind and that she along with her sister, Premila, and mother, Shardaben, was residing with her, for the purpose of looking after her health and requirements for about 20 days prior to her death on 7.5.1967. It was alleged that she was not in a position to comprehend the extent of her property and the nature of claim of others and to form the necessary judgment. It was also alleged

that the will was the result of undue influence exercised upon the testatrix by the propounders and that it was not legally executed and attested. In paragraph 25 of her affidavit, which has been adopted by her as her written statement, it was alleged that the petitioners took possession of the estate and applied seals on the date of the death of the testatrix, without intimating the next of kins about their rights and powers under the alleged will, nor even apprising them with the situation.

2.3 Similar were the objections of the present respondent No.5, Caveator Premilaben, who in her objections dated 17.1.1972 at Exh.50 filed in the probate application, which was adopted by her as the written statement on 17.1.1975 by note Exh.6 filed in the suit, and she also, in paragraph 9 of that affidavit, in terms stated that after Chandanben expired on 7.5.1967, the petitioners (i.e. the executors) along with Munim Natvarlal, had taken over the possession of all the properties, including the residential house in which she had passed away, and that they had taken custody even of the gold ornaments, diamonds and pearls belonging to this Caveator, which were not returned to her, despite repeated demands. In view of the contest, the probate application was converted into Civil Suit No.2873 of 1974 and Janardhan, stepson of the testatrix, filed his written statement, Exh.20, raising similar contentions, as were raised by him in his objections, reiterating that the testatrix had acted completely under the undue influence of the plaintiffs. It was reiterated that the testatrix did not execute the will and that it was not a valid will. It was also contended that his real mother, Shardaben, and sisters, Manorama and Premila, were residing with the deceased since about 2 weeks prior to 1.5.1967, being the date on which the will is said to have been executed. It was reiterated that the deceased had lost her vision due to cataract in both the eyes and was mentally and physically feeble and not in a sound disposing state of mind. The allegations regarding undue influence were also repeated.

2.4 Shardaben, who was co-widow of the testatrix, had filed objections at Exh.47 in the probate application, in which it was stated that she and her two daughters had come to stay with Chandanben on 24.4.1967 and stayed with her till she passed away. It was alleged that she did not come to know about the will in question having been made on 1.5.1967. It was stated in para 5 of the affidavit that the deceased had made a registered will on 14.3.1955 and a codicil, as per which she had made arrangements, which would show that she had a liking for

this Caveator and her children. It was alleged that there was no reason for her to cancel that arrangement and will away most of the properties to charities. It was also alleged that the will in dispute was registered nearly two-and-a-half months after it was made. After the probate application was converted into the suit, this Caveator filed her written statement Exh.26, reiterating the same allegations and contending that the testatrix was not in a proper state of mind and body to make the will.

2.5 The present respondents Nos. 6 and 7, Vadilal and Shantilal, who were cousin brothers of the testatrix, filed their written statement at Exh.37, supporting the plaintiffs-executors and stating that they did not object to the execution and validity of the will and that since the relations of Janardhan and Chandanben were strained, Chandanben had made the will in question. It was alleged that Janardhan had bitterly quarrelled with Chandanben about a month prior to the execution of the will, in presence of these persons and therefore Chandanben had made the will in question on 1.5.1967, by which she willed away the property which she had inherited from her father, Somnath, to charities.

3. The trial Court framed the issues at Exh.48 and came to a finding that the plaintiffs proved that the said will was executed by deceased Chandanben in her sound and disposing state of mind (issue No.(3)); and that the defendants failed to prove that it was a fabricated will (issue No.(2)). On issue No.6, the trial Court negatived the allegation that the will was executed by Chandanben under undue influence of the plaintiffs.

Issue No.1 was on the question as to whether the properties mentioned in the will were of the ownership of Chandanben and that she could have disposed them of. On that issue, the trial Court held that it was not at all necessary to conclude anything in a probate petition, except the validity, genuineness and due execution of the will and the factum of appointment of executors thereunder. The said issue contemplated inquiry into the title of the properties, which were dealt with in the will by Chandanben. It is well-settled that the grant of probate does not have the effect of construing the will nor does it determine the question of title to the property. It was, therefore, rightly conceded by all the parties before the probate court that this issue did not arise for its consideration. This decision is not questioned before us by any one, and, in our view, rightly so.

4. The will in question is said to have been executed on 1.5.1967. The testatrix Chandanben passed away on 7.5.1967. The will was presented for registration on 25.7.1967 before the Sub Registrar, Ahmedabad. The contentions, which have been raised before us, centre around the validity of the will and the manner of its execution, as also the nature of the dispositions made thereunder. It would, therefore, be appropriate to have a careful look at the will, which is at Exh.77.

The original will, which is before us, is a typed will. It is tied with a pink ribbon as well as with a white string. It is a detailed will and the testatrix's full signature appears at the bottom of typed page 19 of the will, behind which page there is an endorsement and signature said to have been made by witness Maheshbhai Jashwantlal Shah, the Justice of the Peace, on 1.5.1967 along with his seal of office. The accompaniments of this will are Schedules ` ', ` ' and ` ' which we will, for convenience, refer as `A',`B' and `C', respectively. All these also are typed papes. Schedule 'A' has seven typed pages; Schedule 'B' has eight typed pages and Schedule 'C' has five. Behind the 5th typed page of Schedule 'B', there are endorsements showing that this will was presented before the Sub Registrar on 25.7.1967. On that page, the endorsement shows that it was produced by one of the executors, described as Kesuprasad Motilal Jani. On the same page, there is recorded the statement given by Maheshbhai Jashwantlal Shah, the Justice of the Peace, before the Sub Registrar, and is followed, on the next page, by the statement of Chimanlal Jivanlal, the attesting witness, after which comes the statement of Chandulal Jagannath Raval, the other attesting witness. All these statements are given on oath before the Joint Sub Registrar, who has put his signatures and seals of office. After this will, there are two papers which have been stitched along with it with the white string and these are certified copies of extracts from the property register (Village Form 6) dated 2.6.1976 and the docket of Advocate, Dalsukhbhai Amritlal Mehta. The white string covers this village form and docket, while the pink ribbon covers the will and its accompaniments as well as the statements recorded before the Sub Registrar. Therefore, white string seems to have been applied at the time of presenting the will before the probate court by the Advocate. At the top on left corner of the will, there are pin-marks on each page upto the last page of Schedule 'C'. On the further two pages on which the statements of the attesting witnesses were recorded by

the Sub Registrar, there are no corresponding pin-marks. This shows that at some point of time the will, including the schedules, were pinned together and those pins were removed. The number of pin-marks indicate that they were pinned together more than once. The papers of the will are ordinary papers and show sign of decay, though all the writings are easily readable, at least on this date.

We are describing the state of the will in the context of the arguments which have been canvassed before us, which we will consider later.

4.1 The will has initials of Chandanben Somnath on each page upto the 19th page, below which there is also her full signature, as noted above. In the deposition of one of the witnesses, there was some confusion about the existence of initials of Chandanben on pages 4 and 12. But on the examination of the original will, both the learned Counsel have agreed that the initials occur even on these two pages. We have checked up the original will and find that initials are there in all these pages in the margin. While there are initials on each page at one place of the margin, we find that on page No.10, where there is some correction in census number and overtyping in No.4238, there is also second initial placed against the line which containes the overwritten figures. Even on page 11, we find that there are two initials and one of them is against the overwriting in the word "Makan". On page 19 of the will, the signature, which is said to have been put by the testatrix, is in Gujarati and it seems to have been compressed in whatever little space was left at the bottom of the page, after the date of "1st May, 1967" was written. That signature reads "Chandan Somnath, daughter of Bhudardas and widow of Badrinarayan Jamnadas". Opposite that signature, are signatures said to have been put by the attesting witnesses, Chimanlal Jivanlal and Raval Chandulal Jagannath. There is overwriting at the place where "Chandulal" is written. The name "Chandulal" can be read, while looking at the document, but the name written below "Chandulal" cannot easily be read by a mere look at the document. It appears that later on, during the arguments, an enlarged copy of the signature, which was not shown to the attesting witness, Raval Chandulal Jagannath, since the enlargement was not available and was not on record when he was examined, was relied upon to ascertain the overwritten name and it showed that below the name Chandulal, Chimanlal was first written. There is no overwriting in the signature of Raval Chandulal Jagannath at the places where his surname "Raval" and his father's name "Jagannath" appear.

There are seals of Justice of the Peace, Mr.Mahesh Jashwantlal Shah, and his signatures throughout in this will. The seals, which appear between pages 2 and 19, are said to have been put at the time when the will was attested, leaving impression of one seal in between two pages. The signature of M.J.Shah runs across two pages in the margines above the place where the seals are affixed. There are similarly affixed seals of the Deputy Registrar's office, in the will. On the reverse of the typed page 19 also, there is a seal of Maheshbhai Jashwantlal Shah, below his endorsement, and his signature with the date 1.5.1967. In that endorsement, it is stated that the entire writing of the will was read over to Chandanben in her proper state of mind and body and alertness, in presence of the witnesses and that she had affirmed that it was proper and further that she had put her signature in his presence and the witnesses had also signed in his presence. On the first page of Schedule 'A', there is signature and seal of M.J.Shah and between pages 2 to 7 of that Schedule, the signature and seal are spread over the margin of two pages and on page 7 there is an additional seal and signature of Maheshbhai Jashnwantlal Shah, Justice of Peace, with day 1.5.1967 written below it. There are similar seals and signatures of M.J.Shah in Schedule 'B' and Schedule 'C'. At the end of both these Schedules, there is additional seal and signature of M.J.Shah. All throughout these pages, there is seal of the office of the Joint Sub Registrar.

5.1 We may now note the contents of the will. In its initial portion, the history of past wills made by the testatrix is given and it is stated that she had made a will on 19.9.1950, which was registered on 16.10.1950, which she was hereby cancelling. Then there is a reference to another will made on 24.7.1951 which was got registered on 21.1.1952 in the Sub Registry, Ahmedabad and for that also it is stated that the will was hereby cancelled. Then there is reference to will and codicil dated 14.3.1955, which were registered on 17.3.1955, which were also cancelled. The will further records that there was another will dated 31.8.1996, which was unregistered and which was also hereby cancelled. Then there is an omnibus statement that any other will, registered or unregistered, or codicil that may surface, was also cancelled hereby.

5.2 In paragraph 2 of the will, it is stated that the testatrix did not have any child of her own, nor had she adopted one. Her husband, Badrinarayan Jamnadas Patel had died on 13.12.1951. He had another wife, Sharda,

whose son was Janardhan, and she had two daughters, Manorama and Premila. It is stated that all these persons were got married by the testatrix.

5.3 It is then recorded that on 1.5.1949, there was a partition of the moveable properties of the joint family between her husband Badrinarayan and minor, Janardhan, Sharda and the testatrix and four declarations were registered in that regard on 6.5.1949. It is stated that the moveable property, which came to her under such declaration, became her own property and there was also partition of the immoveable property between these members of the joint family and under the partition-deed dated 18.5.1949, certain immoveable properties came to her share. It is stated that she had made registered will dated 19.9.1950 in respect of the said moveable and immoveable properties, which had come to her share on the partition of the joint family and that will she was hereby cancelling. Then are enumerated the moveable and immoveable properties, out of these properties, which had remained with her, in sub-paragraphs (a) to (f). Sub-paragraph (a) enumerates immoveable property of survey No.548 Part, admeasuring 1391 sq. yards in Wadej. In sub-paragraph (b), there is reference to the Shares of mill companies mentioned therein, which were acquired by her out of the proceeds of the immoveable properties at Naroda, which was sold by her a decade back. In sub-paragraph (c), there is mentioned immoveable property, which is described as Survey No.68-68A and 70-B Part, plot No.4, admeasuring 562 sq.yards in Shahibaug Patel Society. In sub-paragraph (d), there is mention of the insurance policies which amount, as stated therein, was spent by her on her stepdaughter, Manorama's marriage. In sub-paragraph (e), it is stated that all the ornaments, diamonds, pearls, household furniture and other effects which she had received from her husband Badrinarayan in her share, were already given to her stepson, Janardhan, and his sisters and mother and therefore nothing was required to be done in respect thereof. In sub-paragraph (f), it is stated that she had an account in Central Bank of India in which there was a sum of Rs.200/- lying in credit.

After describing the properties, which had come to her at the time of partition from her husband, Badrinarayan, she makes a disposition of these properties by stating that on her death, the trustees named in paragraph 5 of the will shall take over these properties in their possession as owners, and after spending an amount of Rs.3,000/- on her obsequies,etc. and paying the estate-duty and taxes, for which a lump sum amount of

Rs.4,000/- should be deducted, all the remaining property will be given to her stopson, Janardhan Badrinarayan. It is stated that if Janardhan did not give the amount of Rs.7,000/- to the trustees, the said properties should be sold by the trustees and after deducting an amount of Rs.7,000/- from the sale proceeds, rest of the amount should be given to Janardhan.

5.4 Having thus dealt with the properties, which Chandanben had acquired from her husband's side, she then proceeds to deal with the properties which she acquired from her father, Somnath Bhudardas Patel,in paragraph 3 onwards of the will. It is stated that the testatrix had, during the lifetime of her father, Somnath Bhudardas Patel, given certain properties of which she was the absolute owner and which were mentioned in Schedule A. She had also inherited certain properties under the registered will of her father, made on 23.4.1928, and on the death of her father, occurring on 16.11.1935, she had become the owner of those properties, which are mentioned in Schedule 'B' to the will. The properties, which were acquired by her from the interest etc. earned out of these properties, were enumerated in schedule 'C' of the will. It is stated in para 4 of the will that these Schedules 'A', 'B' and "C" shall be treated as a part of the will and all these properties that she may be owning at the time of her death as well as all other properties that she may acquire or which may have been, through oversight, not mentioned in the will be administered, as mentioned in this will.

5.5 In paragraph 5 of the will, referring to the properties mentioned in Schedule 'A' and the property bearing Survey No.4265, which is mentioned in Schedule 'B', and any other property that she may acquire, as also furniture, household articles, telephone and all other immoveable properties, that may be found in the residential house bearing Survey No.2785 in Lamba Pada's Pole, should be treated as part of Schedule 'A' and all such properties and any property that may have through oversight, not been mentioned in the will, should be administered by Sheth Ambalal Himatlal, Chandrakant Motibhai Jagabhaivala and Kesuprasad Motilal Jani, who were appointed as "trustees". It is stated that these three persons were people of her confidence and they should take over the possession of the properties mentioned in Schedule 'A' and administer these properties and their income in the manner indicated, and these properties should be given as stated in the following paragraph. This statement occurs on page 8 of the will and after the word "para", there is some blank space on

the strength of which it is contended that this will contained blank space which was a suspicious circumstance. It is then stated that the trustees should incur the expenditure on her obsequies and in giving donations as they deem proper, from her properties, which should not be less than Rs.25,000/- and that it would be open for them to expend a higher amount.

5.6 In the following sub-paragraph, it is stated that the amount mentioned therein should be spent on the death anniversary and 'Shradh' of her father Somnath mother Shakriben, grandfather Bhudardas, and grandmother Bai Manek. If for any reason, the trustees are not in a position to expend this amount for the purpose indicated on the dates in question, they should give that amount to Sadhus and Gaushalas. It is then stated that the house bearing Survey No.4265 in which she was residing should be given to such person as may be decided upon by the trustees to manage her affairs, in keeping with her social status and the house bearing Census No.4238, which was being used for worship since long, should be continued to be used for worship as well as for the office of the trust and for stocking foodgrains and vessels. It is then stated that Census No.1039 of Survey No.68, which was her bungalow described in Schedule 'A' and which is in Shahibaug area, was occupied by her stepson Janardhan with his family by her permission, and that bungalow should be handed over to the trustees of Somnath Budhardas Trust as owners, after her demise and the trustees should provide that bungalow for the stay of Sadhus and Saints,etc., and the open land around that bungalow should be utilised for growing flower-plants and trees and the flowers should be used in the worship of Kamnath Mahadev and for such other purpose, as may be deemed proper by the trustees. Out of the properties and income from the properties mentioned in Schedule 'A', whatever remains after making the aforesaid arrangement and incurring the expenses on payment of taxes, salaries of employees etc., should be used by her trustees on such of her kith and kin, who were allowed to reside on leave and licence basis in her house bearing Census No.2785 in Raipur Lamba Pada's pole, Piparadi's pole, as the trustees may deem fit and proper.

5.7 It is then stated that if any of the said trustees expires, resigns, is relieved, or becomes incompetent under the Indian Trusts Act, then the remaining trustees can appoint a person whom they find suitable as a trustee, but, in any event, if the trustees are less than two at any point of time, then the other trustees were to be appointed by the civil court,

Ahmedabad, from amongst suitable persons. It is stated that the Charity Commissioner should, under no circumstance, interfere in this arrangement, because the properties mentioned in Schedule 'A' were not to be administered for any public purpose, but were to be administered for her personal purpose.

5.8 It is then stated that the trustees will not be personally liable for any damage that may be caused due to their bona fide acts. It is also stated that these trustees had agreed to work without any remuneration and that whosoever may be appointed as trustee will also work without any remuneration. It is then stated that the expenses that may be incurred by the trustees on income-tax, estate duty, audit and lawyers would be reimbursible and that the trustees can make payments for these services or such work.

5.9 In the next paragraph, it is stated that the properties which are mentioned in Schedules 'B' and 'C', other than census Nos.2785 Part (Survey No.4265), should be given to the trustees of Somnath Bhudardas Trust, who should take over these properties as owners on her death and administer them as stated in sub-paragraphs (a) to (p) of the said paragraph. These are various charities to deaf and dumb school at Ahmedabad, Mahipatram Rupram Anathashram, Shri Ranchhodraiji Temple, Dakor, Shri Jagdish Temple, Ahmedabad, for serving water in summer at appropriate places, for placing a water cooler in the compound of Kamnath Mahadev, for helping the sick, for trough, wells, etc. for animals, for providing fodder to Gaushala, for the Ranchhodji Mandir at Dwarka, for Shankaracharya of Jagannath Puri, for Ambaji Trust, for Baucharaji Mata Temple at Chanasma Taluka, for Kamnath Temple and finally to spend Rs.1,00,000/- for constructing a sanatorium on a hill station, like Mout Abu. It is stated that the house bearing Census No.2785 Part and Survey No.4265, mentioned in Schedule B should be used for the office of Sheth Somnath Bhudardas Trust and for stocking foodgrains and utensils.

5.10 It is then stated that whatever remains after administering the aforesaid property in the manner indicated, except the property bearing Census No.2785 Part, Survey No.4265, her trustees named in the will should pay estate duty from the amount received on the estate duty policy of Rs.5,00,000/- and the amount of Rs.4,000/-, out of the property described in paragraph 1 of the will, and if any further sum is payable, then it should be paid out of the properties of Schedule 'A'. It is stated that the trustees mentioned in paragraph 4 of

the will should take necessary steps for taking out probate of the will and they could expend the necessary amount for engaging lawyer, etc. from the properties mentioned in Schedule 'A'.

5.11 It is then stated that she had no child of her own and that she was the absolute owner of the properties given to her under the will of her father, dated 23.4.1928. In that will, it was stated that one of the houses should be allowed to be used by the sons of the brother of Somnath, if they kept respect of the testatrix. However, since they did not keep respect of her and were insulting and abusing her, they were not fit for getting that house. It is stated that none of the houses which she got from her father should be given to any of the sons of her father's brother by the trustees and the trustees should use the properties for the purposes already indicated.

5.12 In the next paragraph, she has stated that since her father's brother's sons, Vadilal and Shantilal, and his daughters, Savita and Narmada, had misbehaved and insulted her, they were not entitled to receive any amount as per the will of her father and that trustees should not give any share to them or any other property.

5.13 In the next paragraph, it is stated that the testatrix had purchased the house of Vadilal and Shantilal under a registered deed dated 21.3.1963 from Patel Hiralal Vallabhdas, who had bought it in a court-auction, and she was the sole owner of that house. By agreement dated 23.2.1963, they were allowed to reside in the house, but after her lifetime, the trustees mentioned in paragraph 4 of the will, should take over the possession of the house and appropriately manage the same, and for such purposes, spend the income therefrom or sell it. It is then stated that the will will operate after her death.

5.14 In the final paragraph, it is stated that the will was executed after being read over to her and understanding the same and was made of her ownvolition and in proper state of mind and body and alertness.

5.15 In Schedule 'A' of the will, after enumerating 33 items of various shares, on page 7 thereof, there is reference to the bank account in Bank of India, Manek Chowk Branch; Motor Car Fiat No.GJA 5568, a deposit receipt of Rs.1000/- of Janardhanbhai Badrinarayan, as the outstanding dues from him and a sum of Rs.6500/- as outstanding dues from the Ahmedabad Sarangpur

Mills.Co.Ltd. Below that item, there is reference to the immoveable property of Shahibaug, bearing Municipal Census No.1039-D to 1039-D3, Survey No.68 to 68-3, a bungalow known as "Chandan Bhuvan".

5.16 Schedule 'B' enumerates various shares in 34 items and thereafter there is mention of the Central Bank of India, Savings Account No.3824 in Raipur Branch and deposits of Rs.1,000/- with the Central Bank of India, Rs.1536/- Telephone Divisional Engineer, Rs.5406 of annuity deposit. Rs.825 are shown as dues in the name of Badrinarayan Jamnadas. Below that, on page 8, is the list of immoveable properties, which are Municipal Census No.2785, Survey No.4238, 4265 of Raipur Lamba Pada's Pole, Khadia and house bearing Municipal Census No.2751-1-2-3, Kha-1 in Raipur Lamba Pada's Pole, and Municipal Census No.315-316 to 316-3, 317 and 302 of Bhavan Pitha.

5.17 In Schedule 'C', the shares are mentioned at Sr.Nos.1 to 25 and thereafter there is mention of the savings account No.7127 of the Central Bank of India, Raipur Branch; Ambassador Motor Car No.GJE 5826; deposits with the Central Bank of India, Raipur Branch (Rs.2051-78 ps.); deposit receipt of Bihari Mills Co.Ltd. (Rs.2500/-), and annuity deposit (Rs.1440).

6.1 The learned Counsel appearing for the appellants submitted that the onus lay on the propounders of the will to prove that the will was duly executed. He submitted that execution of a will was not simple proving of the signatures of the testatrix and attesting witnesses and the Conscience of the Court was required to be satisfied that the will was duly executed and all the suspicious circumstances satisfactorily explained. It was argued that there was a complete black out of all that had preceded the preparation of the will and the person (late Shri D.A. Mehta) who could have thrown light as to how the will was prepared and would have been a witness to show the due execution of the will, had chosen to appear as the advocate for the propounders and did not step in to the witness-box, during the trial. It was only at the stage of arguments that the propounder pretended to offer him for examining as a witness and that Advocate at a belated stage offered himself to be examined. It was contended that resolving of supicious circumstances surrounding the execution of will was to be done first before relying upon the will, on the basis of its formal proof. It was submitted that even in case of a registered will, the principle that propounder must clear the suspicions by satisfactory evidence applied

with equal force, especially when the will was registered after the demise of the testatrix. Referring to the will, Exh.77, it was argued that the signature and attestation appear to have been made in the will, before it was typed, because there was too much space between the word "Ta" and figure "1", and the word "Mahe" and word "Sane", on page 19 of the will, where the date was written, and these spacings seem to have been caused with a view to accommodate the already existing letters "Cha" and "da" and name "Somnath" in the purported signature of the testatrix. It was stated that the letter 'aa' in the word "aatre" was typed in the margin because the name "Bhudardas" was written there. Moreover, the word "Ma" was typed above the alignment of the line because the letter "Ma" of the name "Somnath" must have been already there. It was further argued that since the trial Court had not relied upon the attesting signature of the attesting witness, Chandulal, it was incumbent upon the propounders to have examined the other attesting witness, Chimanlal Jivanlal. The propounders did not examine Munim Natvarlal, who is said to have been present near about the place where the will was allegedly executed. Moreover, Ambalal, who was also named as an executor, and referred to as a person, who was present, in the earlier affidavits of the attesting witnesss, which were filed along with the probate application, was also not examined. It was further contended that there were several suspicious circumstances surrounding the execution of the will and therefore the burden of proving the execution was heavier on the propounders. It was submitted that a will operated 'in rem', when probate was granted, in the sense that it was valid against the whole world and therefore it was not a mere 'lis' between the propounders and the caveators and the conscience of the court was required to be satisfied and therefore where there were suspicious circumstances, the court must view the matter with great concern and it is only if all those circumstances are explained satisfactorily that a probate can be granted. Summarising the suspicious circumstances, the Counsel argued that the propounders of the will derived benefits under the will, inasmuch as they were empowered to take over the properties as owners and administer them. It was submitted that an interest of a trustee or an executor was a beneficial interest. It was next contended that the testatrix's signature showed a slant and the writing reflected a feeble mind, which was a suspicious circumstance. Moreover, the Schedules, which were initialled by the Justice of the Peace, Mr.M.J.Shah, were not initialled by the testatrix, which also was a suspicious circumstance. Furthermore, the names of the three executors were already typed in

the will, though their consent was not obtained, as stated by Kesubhai Jani in his deposition. It was argued that the testatrix would never write the names of the executors beforedhand, without obtaining their consent and therefore the existence of these names in the will creates a suspicion about its execution. Moreover, non-registration of the will during the lifetime of the testatrix and its registration after her death by the propounders, both were suspicious circumstances. It was also argued that at some places, the initials of the testatrix had gone within the stitched portion, which was also a suspicious circumstance, particularly in face of the deposition of some witnesses that when the will was executed, it was already in a stitched condition. It was also contended that the fact that Janardhan is disinherited from all the properties, which the testatrix has given to charities, showed that the disposition was not rational and and this should excite suspicion in the mind of the Court. It was submitted that Chandanben could not have acted on a sudden impulse to execute the will in absence of her lawer, D.A. Mehta, who had drafted it, and merely on some chance witnesses, dropping in, in the house.

It was contended that the fact that Shardaben and her two daughters were with the testatrix since about 20 days prior to her death shows that the health of the testatrix was deteriorating and that she was not of sound disposing mind. It was also argued that the dispositions made by her here unnatural, improbable and unfair and Janardhan who was given legacy of Shahibaug Bungalow in the previous will, was being disinherited without any valid reason. It was also contended that the testatrix did not know the contents of the will at the time of the alleged execution because had she known the same, she would not have asked the will to be read over to her. Moreover, when she had not read the will, she could not have been so willing and ready to execute it and her sending for two witnesses without having read the will, was an unnatural conduct raising suspicion as regards the execution of the will. It was contended that the fact that the attesting witness Chandulal denied having over-written his name Chandulal on the previously written name Chimanlal shows that he had no regard for truth and therefore, he can never be relied upon as an attesting witness. Moreover, since he was a Pujari connected with Somnath Trust, he was an interested witness. It was also contended that M.J.Shah, the Justice of the Peace, was a collaborator of the executor Kesuprasad Jani and therefore, no reliance can be placed on his version. Moreover, M.J.Shah could not have carried his seal of

office with him at the time when he is said to have gone to Chandanben's house only for collecting donation with Kesuprasad Jani. It was argued that the donation story put up by this witness was a concoction and it was not a verifiable story. It was also contended that the property acquired after the life-time of Somnath, father of the testatrix was also shown in the schedule Annexure"A". The learned Counsel took us through the decisions of the Supreme Court in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and ors., reported in 1959 S.C 443, Shashi Kumar Banerjee and ors. Vs. Subodh Kumar Banerjee reported in AIR 1964 S.C 529, Rani Purnima Debi and anr. Vs. Kumar Khagendra Narayan Deb and anr. reported in AIR 1962 S.C 567, Ramchandra Rambux Vs. Champabhai and ors. reported in AIR 1965 S.C 354, Satya Pal Gopal Das Vs. Smt. Panchubala Dasi and ors. reported in AIR 1985 S.C 500, Ram Piari Vs. Bhagwant and ors., reported in AIR 1990 S.C 1742, Guro (Smt) Vs. Atma Singh and ors. reported in (1992) 2 SCC 507 and the decisions of the Privi Council in Ram Gopal Lal Vs. Aipna Kunwar, reported in AIR 1922 Privy Council 366, (Srimati) Sarat Kumari Bibi Vs. Rai Sakhi Chand Bahadur, reported in AIR 1929 Privy Council 45. 2. He also referred to the decisions of the Bombay High Court in Rangavva Hanmappa Bidri Vs. Sheshappa Bidri, reported in 29 BLR 327, Vellasawmy Servai Vs. L. Sivaraman Servai, reported in 32 BLR 511, Fakirji Edulji Bharucha Vs. Bomanji Munchershaw Jhaveri and ors., reported in AIR (33) 1946 Bombay 495 as well as the decision of the Madras High Court in Sadachi Ammal Vs. Rajathi Ammal and ors. reported in AIR 1940 Madras 315, Garib Shaw Vs. Smt. Patia Dassi w/o Narayan Chandra Shaw and ors. reported in AIR 1938 Calcutta 290, Chandi Dasi Vs. Jiauddin Miah reported in AIR (36) 1949 Assam 83.

7. The learned Counsel appearing for the respondents No.1/1, 1/2 and 2 on the other hand contended that the execution of the will was duly proved by the propounders in the probate proceedings. He submitted that from the depositions of the attesting witness Maheshbhai J. Shah and Chandulal Raval, as also from the deposition of Kesuprasad Jani, it was proved that the will was executed by the testatrix Chandanben. He also submitted that the evidence clearly discloses that the testatrix was in a sound and disposing state of mind on the date of the execution of the will. According to him, there were no suspicious circumstances surrounding the execution of the will. He argued that real, germane and valid suspicious features alone could create a doubt as to the execution of the will and not a mere fantasy of a doubting mind. It was only when something was done which was not normal

or not normally expected to be done in a normal situation or was not accepted of a normal person that a suspicion can arise as regards the execution of a will. He relied upon the decisions of the Supreme Court in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and others, reported in AIR 1959 SC 443, PPK Gopalan Nambiar Vs. PPK Balakrishnan Nambiar & Ors. reported in JT 1995 (5) S.C 163, Smt. Indu Bala Bose and ors. Vs. Manindra Chandra Bose and anr., reported in AIR 1982 S.C 133 in support of his submissions. He further argued that the propounders did not derive any benefit under the will and they were not to charge any remuneration for their services as executors. Merely because they were appointed as executors to administer the estate and loosely described as trustees, it cannot be said that they acquired any benefit under the will. He submitted that bequest to charities was not a personal benefit to these executors. He further submitted that the schedules attached to the will were part of the will and there was ample intrinsic evidence in the body of the will to identify these three schedules. He submitted that even the Shahibaug Bungalow said to have been occupied by Janardhan, which is mentioned in Schedule "A" is already referred to in the body of the will on page 10 as the bungalow mentioned in Schedule "A". He therefore, submitted that there was no basis for doubting the existence of the Schedules attached to the will at the time when the will was executed. He also contended that the appellant Janardhan was not disinherited and a sizable property was given to him under the will. That property was acquired by the testatrix from her husband's side. The properties which she acquired from her father's side, have been given to charities. These properties received by her from her father's side would even otherwise not have devolved on Janardhan, had she died intestate, in view of the provisions of Section 15(2)(a) of the Hindu Succession Act, 1956. He pointed out that under Section 15(2) of the said Act, notwithstanding anything contained in sub-section (1), any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter (which excludes step-son, as held in Lachman Singh Vs. Kirpa Singh and ors., reported in [1987] 2 SCC 547) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of her father. He therefore submitted that the properties which she had acquired from her father Somnath Bhudardas would have devolved on the heirs of her father and not on her stepson Janardhan. It was therefore contended that the will was rational and showed application of mind. He submitted that in any event, disinheriting an heir by itself cannot be treated as a

suspicious circumstance. He relied upon the decisions of the Supreme Court in Smt. Indu Bala Bose and ors. Vs. Manindra Chandra Bose and anr. reported in AIR 1982 S.C 133, Rabindra Nath Mukherjee and anr. Vs. Panchanan Banerjee (dead) by L.Rs and ors. reported in AIR 1995 SC 1684 in support of his contentions. He further submitted that the witneses cannot be described as chance witnesses and that even if they were chance witness, their evidence cannot be discarded. He placed reliance on the decision of the Supreme Court in Shashi Kumar Banerjee and ors. Vs. Subodh Kumar Banerjee, reported in AIR 1964 S.C 529 in support of his contention. He further contended that the evidence disclosed that the other attesting witness Chimanlal Jivandas was bed-ridden and therefore, he could not be examined. He submitted that M.J.Shah was also an attesting witness and labelling as attesting witness was not necessary. He submitted that he had sufficient animous testandi and was a reliable attesting witness.

8. The learned Counsel appearing for respondent No.1/3 adopted the above contentions and added that use of mere influence would not vitiate the will and that it should be an undue influence, the exercise of which interferes with the free agency of the testator which alone can vitiate the will. He submitted that the proponders did not exercise any such undue influence. He referred to the decision of the Calcutta High Court in Alok Kumar Aich Vs. Asoke Kumar Aich and ors., reported in AIR 1982 Calcutta 599 and the decision of the Supreme Court in Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta, reported in AIR 1955 S.C 363, in support of his contention. He submitted that if the will Ex.77 is read in context of the will of Somnath Bhudardas Ex.64 which was executed in 1928 and the trust deeds made by him at Exs. 65 and 66, it would go to show that by making provision for the charities out of the properties that devolved upon her from her father, she was only giving effect to the wishes of her father which was a normal course of conduct and should not raise any suspicion as regards the execution of the will.

9. As noted above, Sheth Ambalal Himmatlal, Sheth Chandrakant Motilal and Kesuprasad Jani, the original respondent Nos. 1, 2 and 3 of this appeal were appointed as the executors under the will. Their names appear in paragraph 5 of the will on page 8. They are described as persons of the testatrix's confidence and they were appointed to administer the properties as indicated in the will. Under Section 222 of the Indian Succession Act, 1925, it is provided that probate shall be granted only to an executor appointed by the will. Therefore,

these executors have applied for the probate in the present proceedings. Under Section 2(h) "will" means the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. Every person of sound mind not being a minor is capable of making a will and may dispose of his property by will as provided by Section 59 of the said Act. Even persons who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to know what they do by it as mentioned in explanation (2) to Section 59. A person who is ordinarily insane may make a will during an interval in which he is of sound mind, as provided in explanation (3). No person can make a will while he is in such a state of mind whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing. From these provisions it is clear that "sound mind" of a person is a pre-requisite to making of a will and that such person should be able to know what he is doing by making a will. The concept of sound disposing mind is clearly ingrained in Section 59 of the Act. The testator should be capable of exercising a judgement as to the proper mode of disposing his property while making a will. Therefore, even a person who is very feeble and debilitated but capable of exercising a judgement as to the proper mode of disposing his property would be capable of making a will and a will made by him would notwithstanding his feeble health, be treated as valid. Thus, for a sound testamentary capacity, three things must exist at one and the same time namely (i) the testator must understand that he is giving his property to one or more objects of his regard; (ii) he must understand and recollect the extent of his property and (iii) he must also understand the nature and extent of the claims upon him both of those whom he is including in his will and those whom he is excluding from his will, so that it can be said that he knows what he is doing by making a will. We may recall here the criterion to be applied as was stated by Cockburn C.J in Banks Vs. Goodfellow reported in L.R 5 QB 549:-

"It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties -that no insane delusion shall influence his will in disposing of his property and bring

about a disposal of it which, if the mind has been sound, would not have been made."

When the will contains dispositions which are prima-facie irrational and not such as an ordinary testator would make, there would be a rebuttable presumption against sanity. Though unsoundness of mind may occur due to physical infirmity or advancing years as distinguished from mental derangement and the resulting defect of intelligence may be a cause of incapacity, but the intelligence must be reduced to such an extent that the proposed testator does not appreciate the testamentary act in all its bearings. While executing the will, the testator must understand that he is giving his property to one or more objects of his regard; he must understand and recollect the extent of his property; he must also understand the nature and extent of the claims upon him both of those whom he is including in his will and those whom he is excluding from the will; he must realise that he is signing a will and his mind and will must accompany the physical act of execution. When there is no history of any insanity, the testator would be presumed to have remained sane. Evidence of general habits and course of life of a testator at the relevant time would carry great weight when there is no other evidence of the testator's mental capacity.

10. Section 63 of the said Act lays down the Rules for the execution of unprivileged wills and requires that the testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction. It further provides that the signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will. Clause (c) of Section 63 of the Act lays down the rule that a will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the

testator, is void as provided in Section 61 of the said Act. As noted above, the caveators had objected against the validity of the will, inter alia, on the ground that it was executed by the testatrix under the undue influence exercised by the proponder Keshavprasad Jani, who was her co-trustee in several Trusts and a man of her confidence. The importunity must be such as it will render the act no longer a free act of a capable testator. The phrase "such importunity as takes away the free agency of the testator" would take within its sweep undue influence. Undue influence would be coercion into making of a will, which the testator did not want to make. However, mere pursuasion or advice cannot be termed as undue influence. It should be coercive influence by which the testator is driven into making of a will which otherwise he would not have made. As held by the Supreme Court in Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta, reported in AIR 1955 S.C 363, it is elementary law that it is not every influence which is brought to bear on a testator that can be characterised as "undue". It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. And if the testator retains his mental capacity, and there is no element of fraud or coercion, the will cannot be attacked on the ground of undue influence. The Supreme Court approvingly referred to illustration no. (vii) under Section 61 of the said Act, which reads as under:

> "A, being in such a state of health as to be capable of exercising his own judgement and volition, B uses urgent intercession and persuasion with him to induce him to make a will of certain purport. A, in consequence of the intercession and persuasion, but in the free exercise of his judgement and volition, makes his will by the manner recommended by B. The will is not rendered invalid by the intercession and persuasion of B."

The Supreme Court also held that once that a will was executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it. We may note here that though undue influence was specifically alleged in the probate proceedings, at the time of the arguments before us, the learned Counsel for the appellant very fairly submitted that he does not press this ground for assailing the will and in our opinion rightly so, having regard to the facts and circumstances which are

established in the case.

11. In context of the provisions of Section 63 of the Indian Succession Act, laying down the mode of execution of a will, it would be necessary to refer to the provisions of Section 68 of the Evidence Act. Under that provision if a document is required by law to be attested, it shall not be used as evidence until one attesting witness atleast has been called for the purpose of proving its execution if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence, as laid down in Section 71 of the Evidence Act. A will, which requires attestation by at least two witnesses as provided by Section 63 of the said Act, is therefore, required to be proved by calling atleast one attesting witness. The valid execution of a will and its attestation by two witnesses can thus, be proved by deposition of one of such attesting witnesses who is called to give evidence. Unless there is evidence that two attesting witnesses, one of whom has been examined in the case had attested the will after witnessing the signature of the testator or receiving from him a personal acknowledgement of his signature, no valid attestation can be said to have been proved. There is no particular form of attestation required, but the attestation is to be `animus testandi'. Therefore, attesting at will is more than just signing on a will and would mean signing for a particular purpose of testifying the signature of the executor. There can be more that two attesting witnesses as is clear from the wordings of clause (c) of Section 63 of the Act. Therefore, any witness who has put his signature with an intention to attest the document and signs the will in presence of the testator, having seen the testator sign the same, would be an attesting witness as contemplated by clause (c) of Section 63 of the Act.

12. Under Section 67 of the Evidence Act, where a document is alleged to be signed by the person, the signature of such person must be proved to be in his hand-writing and for proving such hand-writing, the opinion of experts and of persons acquainted with the hand-writing of the person concerned would be relevant under the provisions of Sections 45 and 47 of the Evidence Act. The question as to whether the will set up by the propounder was executed by the testator has to be decided in light of the provisions of Sections 59 and 63 of the Indian Succession Act and Sections 67, 68, 45 and

47 of the Indian Evidence Act, as held by the Supreme Court in H.Venkatachala Iyengar Vs. B.N Thimmajamma and ors., reported in AIR 1959 S.C 443. It was held by the Supreme Court that in dealing with the proof of wills, the Court will start with the same enquiry as in the case of proof of documents and the propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and had put his signature to the document of his own free will. It was held that ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder and the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated. It was further held that there may, however, be cases where the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances, or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the testator. It was further held that if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas, circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter. It was further held that if it was shown that the propounder took a prominent

part in the execution of the will and has received substantial benefit thereunder, that by itself would generally be treated as the suspicious circumstance surrounding the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It was observed that the Court in deciding a solemn question as to whether an instrument produced before the Court is the last will of the testator, must be fully satisfied that it had been validly executed by the testator, who was no longer available to give evidence. In paragraph 22 of the judgement, the Supreme Court observed that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of] the evidence. It may however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove them from the mind of the Court by cogent and satisfactory evidence. It was observed that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It was observed that in discovering the truth, judicial mind in such case should be open though vigilent, cautious and circumspect. The Supreme Court approved the dictum in Harmes V. Hinkson 1946 P.C 156 of Lord Du Parcq that, "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief." They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth.

12.1 The ratio of the decision of the Supreme Court in H. Venkatachala Iyengar's case (supra) has been consistently followed in the later decisions of the Supreme Court Rani Purnima Debi and anr. Vs. Kumar Khagendra Narayan Deb anr anr. reported in AIR 1962 S.C 567, Shashi Kumar Banerjee and ors. Vs. Subodh Kumar Banerjee - AIR 1964 S.C 529 (Constitution Bench decision), Smt. Indu Bala Bose and ors. Vs. Manindra Chandra Bose and anr. - AIR 1982 S.C 133, Guro (Smt.) Vs. Atma Singh and ors. (1992) 2 SCC 507.

12.2 We are thus, required to decide the question as to whether the will Exhibit 77 was executed by the testatrix Chandanben in the sound disposing state of mind and in accordance with the Rules laid down for the

execution of the will in light of the aforesaid provisions and the principles propounded by the Apex Court.

12.3 On the formal execution of the will Ex.77 we have taken note of the fact that the document on the face of it bears the initials purporting to be the testatrix on each of the 19 pages with additional initials added on two pages where there were corrections and there is a purported signature of the testatrix at the end of the will, opposite to which there are two purported signatures of the attesting witnesses Chimanlal Jivandas and Raval Chandulal Jagannath. There is also an endorsement made by witness M.J Shah, who was Justice of the Peace, indicating that the testatrix had put her initials and signature and the attesting witnesses had put their signatures in his presence. He had put the seal of his office on all the pages, as also his signatures as noted in detail hereinabove by us. The will mentions the date of 1st May, 1967 as the date of execution and was produced before the Sub-Registrar for registration on 25.7.1967. There are three schedules to the will, which enumerate properties which had devolved upon the testatrix from her father's side and these three schedules are not signed by the testatrix, but there were signatures and seal of witness M.J Shah as Justice of the Peace and these appear to have been made on 1.5.1967 itself. The statements made on oath by M.J Shah, Chimanlal Jivanlal, and Raval Chandulal Jagannath were recorded before the Sub-Registrar, as can be seen from the will. The statement of Shri Mahesh Jaswantlal Shah which is on oath is to the effect that the testatrix Chandanben who had passed away on 7.7.1967 had made a will on 1.5.1967 and at that time she was absolutely in good health. It is stated that she had put her signature in his presence and the two witnesses who were named in the will were also present. It was further stated that the said will was read over by this witness to her and thereafter, she had put her signature in his presence and in the presence of the other two witnesses. It was further stated that three persons were appointed as trustees under that will of whom Kesuprasad Motilal Jani had presented the will for registration. It is then stated that after the will was signed before him, he had put his signatures and seal as Justice of the Peace on that day i.e. 1.5.1967. He has stated that the two attesting witnesses had also put their signatures in his presence at the instance of the testatrix. The statement of Chimanlal Jivanlal which was given on oath before the Joint Sub-Registrar also is to the same effect. According to him, he was called by Natwarlal, Munim of

Chandamben on 1.5.1967 and therefore, he had gone to her house where witness Maheshbhai Shah and others were present. At the instance of Chandanben, M.J Shah had read the will in his presence and Chandanben had put her signature. This witness and Chandulal Jagannath were asked to attest the will and therefore, at her instance, they had put their signatures. Maheshbhai J.Shah had also made an endorsement. He has stated that at that time Chandanben was in good health and that she died on 7.5.1967. The other attesting witness Chandulal Jagannath had also stated on oath that Chandanben's Munim Natvarlal had called him on 1.5.67 in the evening at about 7.00 P.M and therefore, he had gone to her house where Maheshbhai Shah and Chimanlal Jivanlal and others were also present. He has also stated that Mahenshbhai Shah had read over the will and thereafter, Chandanben had put her signatures and at her instance, he and the other attesting witness Chimanlal Jivanlal had attested the same. Thereafter, Maheshbhai Shah was also asked to attest and he had put his signature and seal. This witness also stated before the Sub Registrar that Chandanben was at that time in good health.

12.4 We have noted the contents of the will hereinabove and prima-facie they appear to be rational and the will appears to have been duly executed. The will records the fact that in the past the testatrix had executed registered wills and also unregistered wills and by referring to the specific dates and registration numbers, they have been expressly cancelled. The property which was acquired by the testatrix during the partition of the joint Hindu family from her husband Badrinarayan Jamnadas has been bequeathed to her step-son Janardhan and as noted above, that property also consists of immovable properties. The properties which devolved upon her from her father's side under the will of 1928, as also those which were given to her by her father during his life time as well as those acquired from the income of the properties given to her by her father all are separately dealt with in the will and these are enumerated in Schedules "A", "B" and "C" of the will, as noted in detail hereinabove. These properties which were acquired from her father, were given by her to various charities as noted above. The three executors loosely called trustees in the will are described as persons of her confidence. These persons were, as submitted before us, trustees even in her previous registered will of 1955. It has come in evidence that Kesuprasad Jani was a co-trustee with her in various trusts. Therefore, persons already known to her and who were of her trust and confidence are named as the executors in the will.

As regards the property, which had devolved on the testatrix from her father's side, it could not have by inheritance gone to her step-son Janardhan, in view of the provisions of Section 15(2) of the Hindu Succession Act and the decision of the Supreme Court in Lachman Singh Vs. Kirpa Singh and ors., reported in (1987) 2 Supreme Court Cases 547, in which it was held that the exclusion of stepson from clause (a) of Section 15(1) of the Hindu Succession Act cannot be said to be unfair on the ground that he would thereby be deprived of a share in the property of his father. The word "sons" in clause (a) of Section 15(1) of the Act, would mean sons born out of the womb of a female by the same husband or by different husbands including illegitimate sons too in view of Section 3(j) of the Hindu Succession Act as well as adopted sons who are deemed to be sons for purposes of inheritance. Thus, as regards the properties which devolved on her from her father and are not given to her stepson Janardhan, it cannot be said that the will was on the face of it irrational, improbable or unfair.

12.5 From the contents of the endorsement below the will made by M.J Shah, Justice of the Peace on 1.5.1967 and his signatures and seals as also from the statements made on oath before the Sub-Registrar at the time of registration of the will, as well as from the fact that the said witness M.J Shah had put his signatures and seals through out the will including on the schedules, it appears that the said witness M.J Shah had the requisite `animus testandi' and was an attesting witness properly so called. Though Chandanben, the testatrix as per the evidence on record, sent her Munim Natwarlal to call the attesting witnesses, who as per their statements before the Sub-Registrar had come and attested the execution of the will, even this witness M.J Shah who is an important witness acted as the attesting witness.

13.1 On the question of the execution of the will, the oral evidence on which reliance is placed by the propounders consists mainly of Kesuprasad Motilal Jani, who has deposed at Ex.61, witness M.J Shah, who was Justice of the Peace and was one of the attesting witnesses as observed above,and who has deposed at Ex.70 and the attesting witness Chandulal Jagannath Raval, who has deposed at Ex.76.

13.2 Kesuprasad Jani who was one of the executors of the will and has since passed away, has deposed that he knew the testatrix Chandanben for about 40 to 45 years. He also knew her father Somnath Bhudardas. This witness was an Income Tax Practitioner and has stated that the

Income tax work of the testatrix Chandanben and her father was being done by him since about the year 1949. This witness was appointed as trustee by the testatrix Chandanben for the first time in the year 1951 in the place of the deceased trustee Bhadrinarayan Jamnadas, husband of the testatrix, in Somnath Bhudardas Trust. This witness was also a trustee in `Chandanben Kelavani Pracharak Trust' since 1950 and ' Chandanben Sanitorium Trust' since about 1965. It is clear that this witness had a long-standing association with the testatrix Chandanben and there was nothing unusual in his being named as an executor of the will. As regards the execution of the will Ex.77, this witness has stated that it was signed by Chandanben in his presence. Shri Maheshbhai Shah had read over the will to Chandanben while he was present and thereafter, she had signed the same. Witness M.J Shah had asked Chandanben as to whether the will was alright, and to this she had stated that it was perfectly alright and was as per her desire. The witnesses had thereafter attested the document at the instance of testatrix Chandanben and the attesting witnesses had put their signatures in presence of Chandanben, M.J Shah and this witness. He has stated that he has seen the witnesses attesting the will. Thereafter Maheshbhai had made an endorsement below the will to the effect that the testatrix Chandanben and the attesting witnesses had signed in the will in his presence. He has stated that the said endorsement was made by M.J.Shah in his presence. He has also stated that the initials on each of the pages from pages 1 to 19 were of the testatrix Chandanben and these initials were put by her in his presence. He has also stated that Maheshbhai had put initials on each page of the will and also his seal, in his capacity as Justice of the Peace and this witness had seen him placing the initials and seals on each page. This witness has stated that at the time when the will was executed, Chandanben was in a perfectly good physical health and her mental state was also perfectly good and sound and that she knew what she was doing when she executed the will. He has also stated that Chandanben died of heart attack on 7.5.1967. He has stated that the contents of the will are correct. He has also deposed to the fact that the will was got registered after the death of Chandanben. He has also deposed as to the statements of Chimanlal Jivanlal and Chandulal Jagannath, which were recorded at the time of the registration of the will before the Sub Registrar, and has said that these were recorded in his presence. He has stated that Chandanben who was in a fit state of health, was regularly visiting Kamnath Mahadev Temple on foot before she died. He has stated that Chandanben had

no issue of her own. He has also stated that her relations with her stepson Janardhan were strained because of Janardhan quarrelling with her. Once Janardhan had quarrelled with her in the office of this witness and that was about 3 or 4 months prior to the making of the will. He has stated that the relationship between the testatrix and Janardhan had deteriorated since about an year prior to the will and that Janardhan used to quarrel so much with her that she used to beat her breast. He has stated that she was so much fed up of Janardhan before her death that she had said that it should be seen that Janardhan did not even touch her dead-body and it should be taken to Bharuch. He has stated that the properties which are mentioned in the will belong to Chandanben at the time whe she executed the will. In his cross-examination, he has denied the suggestion that Shardaben, co-widow of Chandanben was residing with her. He has however, admitted that on 1.5.67 Shardaben was in the same house where Chandanben resided. He does not know if two daughters of Shardaben was also in the house at that time. He has denied the suggestion that Chandanben was sick since two months prior to 1.5.67 and has reiterated that she has all along in good health. He has stated that he did not know who had drafted the will and typed it. He has stated that on 1.5.1967 he had gone to Chandanben's house alongwith M.J.Shah to seek a donation from her for Vasant Rajab Trust from any of the trusts under the management of Chandanben. It is stated that Chandanben had told him that she would consult other trustees and decide. It is stated by him that M.J. Shah had also known Chandanben because earlier he was called by her when her stepmother was sick and some of her share certificates were got to be counter-signed and authenticated. It is stated that this had happened about 3 to 4 years before Chandenben's death. It is stated that Mahesh J. Shah kept his seal with him and when they had gone to Chandanben's house, she was sitting on the first floor. He does not know as to who were there in the house on the ground floor. He has stated that Munim Natvarlal was called by Chandanben from the adjoining room and asked to bring two persons from the locality to serve as attesting witness. He has stated that one of the attesting witnesses was residing in the same locality while the other was a Pujari of Kamdev Mahadev Temple. In his cross-examination, he has further stated that when they had reached Chandanben's house, she was having the will in her hand and on seeing this witness and Maheshbhai, she had asked Maheshbhai to read it over to her and it was so read over to Chandanben in the presence of the witnesses. He has stated that after the death of the testatrix that he came to know

that the will was drafted by Advocate Mr. D.A.Mehta. He has accepted the suggestion that Chandanben maintained the accounts of her estate. He has stated that he did not enquire from D.A Mehta whether he was having the original draft of the will. He has also admitted the suggestion put to him in the cross-examination that Chandanben did execute four or five wills in respect of her estate. He has stated that he was not consulted in connection with the execution of the previous wills or the present one. He has then stated that at the time when the will was read over, it was already stitched, but he did not know whether it was stitched with the red string found now on the will. He has admitted in the cross-examination that he was Income Tax Consultant of Somnath Bhudardas Patel, Bhadrinarayan Jamnadas and also of Chandanben for her estate. He has stated that on 1.5.67 Chandanben was perfectly in a position to read the will, but he did not know whether she had herself read it or not. He has stated that the will was found from the cupboard of Chandanben after four to eight days of her death, and that he had applied to the public authorities for registration of the will. He has stated that all the three executors had instructed Advocate D.A.Mehta in connection with the probate application. According to him, Munim Natvarlal had given the will to him and he had presented the same before the Sub-Registrar for registration. He has stated that the will must have come to his possession two to four days after the death of the testatrix and that he did not remember whether he was present or not at the time when it was traced out from the cup-board of testatrix. He has denied the suggestion that the pages containing schedules of property which are found with the will were not there when it was executed or that they were loose and not attached in the will. He has admitted the suggestion in the cross-examination that Chandanben had created two separate trusts for the daughters of Shardaben, co-widow i.e. for her step daughters. He has stated that they took about one or two hours in execution of the will and it's first signatory was Chandanben and the first attesting witness was Chimanlal Jivanlal and after him, Chandulal Jagannath had attested. He has admitted the suggestion that the space for signatures was very small in the will and that the signature of Chandanben appears to be slanting upwards. He has stated that he had advised Chandanben that the will be got registered. He has then stated that he had no occasion to see Chandanben after the execution of the will and before she died. He has stated that when he and Maheshbhai had gone to Chandanben on 1.5.67, the will was in her hand and she might be reading it. He has stated that after the Munim Natwarlal had gone for calling the

witness, they had come within about 10 to 15 minutes and at that time, the will was in the hands of M.J.Shah. He has also stated that there was a tea-break of about 15 minutes in the process of Maheshbhai reading over the will. He has stated that he alongwith Chandanben were trustees in Bhadrinath Jamnadas Trust and she had resigned from the trusteeship. He denied that she had a weak eye-sight. He admitted that in the will of 1957, he may have been named as an executor. He admitted that there were some family members on the ground floor on 1.5.67, but he does not know who they were. He has stated that Chandanben herself wanted the will to be registered. In paragraph 27 of his deposition, in his cross-examination this witness has stated that cateract operation was performed on Chandanben's eyes about 5-6 years prior to her death.

13.3 The deposition of Keshuprasad Jani establishes that the will dated 1st May, 1967 was executed in his presence and that at that time M.J.Shah who was Justice of the Peace had also attested the execution of the will besides the two other attesting witnesses Chimanlal Jivandas and Raval Chandulal Jagannath. His deposition shows that he had a longstanding association with Chandanben and her father and that they reposed great trust in him. He was their Income Tax advisor and a co-trustee with Chandanben in various trusts. It also appears that he was one of the executors in the previous registered will executed in 1955 by Chandanben, which was cancelled under the present will. There is therefore nothing unusual if he and other trusted persons of the testatrix were named as the executors in the will without taking their specific consent. All the three executors having preferred the probate application accepted the office of executors. This witness in paragraph 20 has in terms deposed that Chandanben did tell him at the time of executing the will that she had named him as one of the executors/trustes, but she did not ask for any written consent from him. The main attack against this executor of the will is that he was a chance witness and had not gone to the house of Chandanben on 1.5.1967 with the purpose of witnessing the execution of the will and that his conduct throws a cloud of suspicion over the execution of will because he does not throw light on any of the aspects preceding the execution of the will. The story of having gone for donation is a version which cannot be verified because no donation was in fact given and though he had alongwith other executors engaged Advocate D.A Mehta, he throws no light as to how the draft was prepared and who had typed it. It was contended that this witness Kesuprasad Jani had a

beneficial interest under the will and such propounder who received benefit under the will and had played an active role in the execution of the will ought not to be relied upon. It was contended that the story of the propounder begin with a `fait accompli' in the form of a perfectly typed will prepared by an Advocate. It was therefore submitted that there were suspicious circumstances surrounding the execution of the will and even if the formal signatures of the testator and the attesting witnesses were proved, the propounders were unable to discharge their onus of proving the execution of the will to the satisfaction of the Court by explaining the suspicious circumstances.

13.4 As provided by Section 64 of the Evidence Act, documents must be proved by primary evidence, except in cases secondary evidence relating to documents may be given, as provided in the Act. Primary evidence would mean the document itself, which is required to be produced for inspection of the Court for proving the same. An original will would be a document, which is required to be produced before the Court as primary evidence for proving it. There is no legal requirement of either preparing a draft before finalising a document or of producing a draft along with the original document, which is to be proved by primary evidence. Therefore, when the document itself is produced and sought to be proved, the proof of such document would not depend upon the existence or non-existence or production or non-production of a draft of such document, which may have preceded its execution. Therefore, non-production of the draft of the will, if any, by the propounders cannot be described as a suspicious circumstances. The propounder Kesuprasad Jani has admitted in his deposition that the will was drafted by Advocate, late Shri D.A. Mehta. Obviously, therefore, this witness cannot be expected to say as to from whom late Shri D.A. Mehta had got the draft of the will typed and as to what happened to that draft. Therefore, the deposition of this witness, Kesuprasad, cannot be rejected on the ground that the particulars of the preparation of the draft or whatever happened prior to the final will being prepared, were not forthcoming.

13.5 The contention that Kesuprasad Jani was a chance witness and that he could not have remained present at the time when the will was executed because, according to him, he was not sent for by Chandanben but had himself gone to her along with witness, Mahesh J.Shah, for seeking donation for the Vasant Rajab Trust and therefore no reliance could be placed on him, cannot be accepted.

There is ample evidence to show that Kesuprasad Jani was a man of confidence of Chandanben and even her father, and that he was her Income-tax Consultant as well as a trustee in the trusts created by them. He knew the family for over four decades and there is, therefore, nothing unusual if he went to Chandanben's house. In other words, his presence in Chandanben's house was quite normal. We may here note that even Janardhan in his deposition at Exh.103, has, in terms, stated that till he was residing at Lamba Pada's Pole, Kesuprasad used to come to their house on every second or third day. Even Sharda, co-widow of Chandanben, in her deposition, Exh.108, stated that Kesuprasad would visit the house every second or third day and be with Chandanben and when he came, Chandanben would ask her to go downstairs. We are, therefore, not inclined to view the visit of Kesuprasad Jani to Chandanben's house on the day when the will was executed, i.e. on 1.5.1967, with any suspicion.

13.6 It was sought to be contended for the appellants that since Kesuprasad Jani and witness, M.J.Shah, did not go to Chandanben's house with a view to witness the execution of the will and they did not know before-hand that the will was to be executed by her on that day, they should be treated as mere chance witnesses. Even if these witnesses did not know the fact before-hand that the will was to be executed by Chandanben, when they reached her house, there was nothing unusual on the part of Chandanben to have made use of their visit by requiring them to witness the execution of the will, which was prepared and in her custody. The propounder, Kesuprasad Jani, was frequently going to the house of Chandanben because he was her income-tax advisor as well as a co-trustee. Even Mahesh J.Shah, the Justice of the Peace, was already known to Chandanben since a few years. Therefore, finding these persons, if Chandanben made up her mind to execute the will on that day, it cannot be said that there was any suspicious circumstance arising therefrom in the matter of the execution of the will. In fact, since Kesuprasad Jani was visiting her house almost every alternative day, she would be expecting him, and there was no need to send for him. Even if these two witnesses are taken to have gone to her place by chance, in the sense that they did not go there with the purpose of witnessing the execution of the will, there was nothing impossible in the advantage being taken of their presence in the matter of the execution of the will. As held by the Constitution Bench of the Supreme Court in Shashi Kumar vs. Subodh Kumar, reported in AIR 1964 Supreme Court 529 at 535, it may be that it is more usual for witnesses to be called when a person is intending to

execute a will; even so there is nothing impossible in advantage being taken of the accidental presence of witnesses in this connection. It was observed that if the witnesses were not witnesses of truth, they could easily have stated that they were called by the testator and in the circumstances of the case nobody would have been able to disprove that statement. It was held that the testator had taken advantage of the accidental presence of these two witnesses, whom he knew before and asked them to attest the will. Even in the present case, testatrix knew the propounder, Kesuprasad Jani, very well, and she also knew M.J.Shah, the Justice of the Peace, who had accompanied Jani to her house. Therefore, the evidence of these witnesses cannot be discounted on this ground, nor can it be said that their presence in Chandanben's house, without being called, was a suspicious circumstance surrounding the execution of the will.

13.7 It was contended that the propounders have not satisfactorily explained as to how did they get hold of the will, though Kesuprasad Jani knew that the will was executed, and this according to the learned Counsel for the appellant, was a suspicious circumstance which should weigh with the Court. Kesuprasad Jani has said that after the will was executed, it remained with Chandanben and it was traced out from her cup-board and handed over to him by Munim Natvarlal. Kesuprasad Jani along with two others were named as executors under the will, and it is but normal that after the death of Chandanben, the will, as also other properties covered under the will, were taken custody of by the executors, including Kesuprasad Jani. The fact that Kesuprasad Jani in his deposition did not state with exactitude as to whether he was given the will after two days or after four or eight days and whether he was present at the time when it was traced out from the cup-board, should not create any suspicion, when deposition was given after over a decade by him. The respondents, Premila and Manorama, stepdaughters of the testatrix, have, both, in their written statements stated that after 7.5.1967, when Chandanben died, the propounder-executors and Chandanben's Munim, Natvarlal, had taken over the possession of the entire property, including their gold ornaments, diamonds and pearls. Manorama has stated in paragraph 25 of her affidavit (Exh.33 of Civil Misc.Application No.552 of 1970), which was adopted by her as the written statement by note Exh.21, filed in the proceedings after it was converted into Civil Suit No.2873 of 1974, that the "petitioners" (i.e.the propounder-executors) took possession of the estate and

applied seals on the date of the death of the testatrix without intimating the next-of-kins their rights and powers under the alleged will nor even appraising them with the situation". Thus, when the executors took over possession of the properties under the will, as was expected of them under the will itself, there was nothing unusual in the fact that the will executed by Chandanben came in Kesuprasad Jani's custody. There is, therefore, nothing suspicious about the fact of the will in question coming in the hands of the propounders.

13.8 One important aspect that emerges from the aforesaid statements made in the written statement by the respondents, Manorama and Premila, is that the executors started functioning as per the will immediately on the death of Chandanben and that they had taken in their possession the properties in question, which were covered under the will. It, therefore, follows that the co-widow, Sharda, and her daughters, Manorama and Premila, as also Janardhan, would have immediately known that these three executors had taken the possession of the properties of Chandanben. It is, therefore, impossible to believe that they were totally oblivious of the fact that the will was executed by Chandanben and that on the strength of such will, the executors had taken over the possession of the properties in question. The fact that Janardhan as well as Shardaben and her daughters, Manorama and Premila, did not object to the properties being taken in their possession by the executors and sealed for nearly three years is eloquent enough to indicate that they must have been aware of the lawful authority of the executors of having taken over the possession of the properties covered under the will.

13.9 We now come to the contention that the evidence of Kesuprasad Jani as regards the execution of the will must be rejected, since he was a propounder of the will, who had a beneficial interest under the will, Exh.77. Under Section 211 of the Indian Succession Act, the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. Under Section 222 of the said Act, probate can be granted only to an executor appointed by the will. As provided by Section 226, when probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors. Probate of a will, when granted, establishes the will from the death of the testator and renders valid all intermediate acts of the executor as such, as provided by Section 227 of the said

Act. Thus, the executor derives title under the will and testator's properties vest in him from the death of the testator. Therefore, he may seize and take in his hands the testator's properties, which are covered under the will, and there can be nothing suspicious in the fact that the properties and effects of the testator covered under the will are found in the custody of the executor. The property bequeathed by the testator vests in the legatee, only when assent of the executor is given, as provided by Section 332 of the said Act. When the executor gives his assent to a specific bequest, that would be sufficient to divest his interest as executor and to transfer the subject of the bequest of the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way, as provided in Section 333 of the said Act. Assent of executor is required even to his own legacy, as provided in Section 335, which lays down that when the executor or administrator is a legatee, his assent to his own legacy is necessary to complete his title to it, in the same way as it is required when the bequest is to another person. These provisions make it abundantly clear that the executor does not acquire any personal benefit, when the property of the deceased person vests in him in his capacity as an executor. It can, therefore, never be said that the executors acquired any beneficial interest under the will, when the will required them to take over the possession of the properties covered under it, as if they were the owners thereof. It is only the legal estate that vests in the executor and the vesting is not of any personal benefit. The words "as such" used in Section 211 of the Act clearly indicate that the executor is not the absolute owner of the property that vests in him, in the sense of being beneficial owner thereof and that the property vests in him only for the purpose of its administration under the will. He gets completely divested of such legal interest as executor, when the property is transferred to the legatee, as envisaged by Section 333. The assent of the executor to a legacy gives effect to it from the death of the testator, as provided by Section 336 of the said Act and therefore an executor gets divested of his interest as an executor with effect from the death of the tesator, when he assents to a specific legacy. This clearly means that no benefit to the executors in their personal capacity was ever intended to be given under the will, Exh.77, and all the powers or rights that they acquired were given to them in their capacity as executors and vested in them only by virtue of their office. Even though these executors have been described as `trustees' in the will, Exh.77, it is clear

that the word "trustee" is used by the testatrix in a loose sense, and what is meant is that they shall be the executors of her property, appointed generally to administer her estate. On the reading of the will, it is clear that they have been assigned duties to administer the estate and no bequest is intended to be given to them in their personal capacity. There is a presumption in law that a legacy to a person appointed as executor is given to him in that character and is attached to the office and if he claims it otherwise than as attached to his office, it would be incumbent on him to show something in the nature of the legacy or other circumstances arising under the will to rebut that presumption. In a case before the Chancery Division, REES' WILL TRUSTS, WILLIAMS v. HOPKINS AND OTHERS, reported in 1949 (1) ALL ENGLAND REPORTS, 609, where a testator, after appointing his friend and his solicitor to be executors and trustees of his will, referring to them as "my trustees" devised and bequeathed all his property, subject to the payment of his funeral and testamentary expenses and debts to " my trustees absolutely they well knowing my wishes concerning the same and I direct them to permit my brother LJR to have and receive the rents and profits of my property at V during his lifetime" and LJR predeceased the testator and before signing his will the testator had intimated to his friend and his solicitor that he desired them after his death to make certain gifts, which amounted in value to some 8,000 pounds and he then told them that they were to have the surplus for their own use and his residuary estate amounted to more than 30,000 pounds, the House of Lords held that on the true construction of the will, the gift was made to the testator's friend and solicitor as trustees and the Court being bound to disregard any evidence to the contrary, they were not beneficially entitled to the surplus. In the present will, Exh.77, there is absolutely nothing which would go to show that any of the properties covered under the will were intended by the testator to be given beneficially to any of the executors and these executors cannot be said to have taken any beneficial interest under the will. We, therefore, hold that there is no suspicious circumstance of the propounder-executors having any beneficial interest under the will existing in the present case.

13.10 From the deposition of Kesuprasad Jani, it, therefore, stands established that on 1.5.1967 the testatrix executed the will, Exh.77, in his presence and that Justice of the Peace, M.J.Shah, who had accompanied him, had attested the will and further that both the other attesting witnesses, namely, Chimanlal Jivanlal and

Raval Chandulal Jagannath, had attested the will of Chandanben and all these persons were witnessed by Kesuprasad Jani, when they had put their signatures at the time of the execution of the will on 1.5.1967. We find absolutely no valid reason for doubting the version of this witness.

14.1 As noted above, the witness, Mahesh J.Shah, had requisite `animus testandi', when he attested the execution of the will. In his earlier statement before the Sub-Registrar, which was given on oath and was reduced in writing by the Sub-Registrar, at the time of the presentation of the will on 25.7.1967, he had in terms stated that he had read over the will at the instance of Chandanben and she had put her signature in his presence as well as in the presence of the two attesting witnesses as also in the presence of Kesuprasad Jani, who was one of the trustees. He has proved his endorsement which he had made at the end of the will in which it was stated that Bai Chandan had put her signature in his presence and the witnesses had attested the same. Even in that endorsement, it is clearly mentioned that the will was read over by this witness before it was signed. At both the places (i.e. in his endorsement as well as his statement before the Sub-Registrar), it was stated that Chandanben was in good state of health at the time of execution of the will and the same are the facts which he has mentioned before the Court, in his deposition at Exh.70. He has stated that he was Justice of the Peace between 1964 and 1976 and he knew the testatrix Chandanben since 1964, which means, he knew her since about 3 years prior to the making of the will and he was no stranger to her. He had earlier gone to Chandanben who wanted some attestation to be done by him in connection with certain shares, which were held by her stepmother. In the past, he had practised law between 1953 and 1958, but in 1967 he was having business and he used to attest documents in his capacity as the Justice of the Peace. He has stated that on 1.5.1967 he had gone for donation to Kesuprasad Jani and they had gone together to the house of Chandanben and it is at that time that Chandanben asked him to read over the will, which she was having. Chandanben had asked her Munim Natvarlal to call two witnesses and the will was read over, after those witnesses arrived. After the will was read over, this witness had ascertained from Chandanben as to whether it was in order and she had stated that it was just in accordance with what she wanted. Thereafter, she had signed below the will. He has stated that she had also made initials on each page of the will, upto page No.19. Thereafter, the two

attesting witnesses had attested the same. He has, in terms, stated that the executant, Chandanben, and the attesting witnesses had signed the will in his presence and within his seeing. The attesting witnesses had attested the will at the instance of Chandanben. He has stated: "Thereafter, I attested it and signed below it at the instance of Chandanben". He has deposed as to the fact that he had put his signatures and seals throughout the will, and has stated that his statement recorded by the Sub-Registrar, was correctly recorded. He has also stated that the two attesting witnesses had given their statements in his presence before the Sub-Registrar. In his cross-examination, he has stated that he used to keep his rubber stamp all along with him in his pockect. This statement evoked criticism from the learned Counsel for the appellants, to the effect that the witness would ordinarily not keep his rubber stamp and seal all along on his person, more particularly when he had gone to Chandanben's house not with any prior knowledge that he had to make attestation, but only with a view to seek donation. In our opinion, this criticism is not justified, for the simple reason that by circular dated 21.3.1963, bearing No.JPS/1062-(1)-D, issued by the Government of Gujarat, and which was referred to by both the sides, the Government had directed that whenever a Justice of the Peace exercises the powers conferred upon him under Section 539D of the Criminal Procedure Code, 1898, of attesting, verifying or authenticating a document, he should affix the seal thereon and that Government desire to impress upon all the Justices of the Peace the need for exercising due care and caution in regard to the safe custody and proper use of the seal. It was directed that every Justice of the Peace should keep the seal in his personal custody and take particular care to see that it does not fall into unauthorised hands through loss or theft. In view of these instructions, there is nothing unusual in this witness, who was Justice of the Peace, following them in letter and spirit, by keeping the seal of his office in his pocket. Under Section 539-D of the Criminal Procedure Code, 1898, which was inserted by the Bombay Act 71 of 1954, it was provided that any Justice of the Peace (not being legal prctitioner) shall be entitled to attest, verify or authenticate documents brought before him for the purpose of attestation, verification or authentication, as the case may be, and to affix such seal thereon, as may be prescribed by the State Government by notification in the Official Gazette. Such attesting, verifying or authenticating a document and affixing the seal of his office was the legally prescribed function of Justice of the Peace. It will be of some historical interest to

note that fit persons alone were to be appointed as Justices of the Peace by every State Government for its territories by a notification in the Official Gazette as provided by Sec. 22 of the Criminal Procedure Code 1898. The West Bengal Act 30 of 1955 substituting Sec.22 specified such fitness by stating that the Govt. should be satisfied as to the integrity and suitability of the person for his appointment as Justice of the Peace. Under Section 25 of the Code, Judges of the High Courts were Justices of the Peace for the whole of India. There is absolutely nothing on the record of this case to suggest anything which would impeach the credibility of this witness, who held statutory office of Justice of the Peace. Merely because he happened to know Kesuprasad Jani, one cannot jump to the conclusion that he had acted in collaboration with Jani and that this witness was out to support any theory of a fabricated document and became party to forgery. His evidence is consistent with his earlier version, and we hold that he also had acted as an attesting witness at the behest of the testatrix, Chandanben, who had already known him, and about three to four years prior to the execution of the will, had utilised his services for attestation purposes. Knowing that this witness was the Justice of the Peace and had power to attest the documents, it was but natural for the testatrix, who was already having her will finally prepared ready for execution, to have requested this witness, who had come with Kesuprasad Jani, to read over and attest the will, after the two attesting witnesses, Chimanlal Jivanlal and Chandulal Jagannath, arrived. He has deposed to the fact that Munim Natvarlal had gone to call the attesting witnesses, though he does not remember whether Chandanben had named the persons to be called or had simply asked two persons to be called. The witness cannot be expected to remember the exact words spoken by Chandanben, when she instructed Munim Natvarlal to call two attesting witnesses. These two attesting witnesses, Chimanlal Jivanlal and Chandulal Jagannath, were not "any Tom, Dick and Harry", as sought to be suggested on behalf of the appellants. Chimanlal Jivanlal was the next door neighbour of the testatrix, Chandanben, and obviously, therefore, he was a person known to her. The other attesting witness. Chandulal Jagannath, was a Poojari in the Kamnath Temple run by her father's trust, and he had known the testatrix for several decades. The testatrix used to visit the temple every day and had known him quite well. Therefore, this second attesting witness, who is examined, was also not a stranger and can be described as a person on whom the testatrix could have relied upon for the purpose of attesting her will.

14.2 Criticism was levelled against this witness and Kesuprasad Jani as regards their version that the will was lying by her side, at the time when they had reached the house of Chandanben. This witness has stated that the will was lying by her side and she was not actually reading it, while Kesuprasad Jani had stated that when they had gone to Chandanben, she had the document, i.e. the will, in her hand. There is hardly any material inconsistency between these two versions, and after ten years, they cannot be expected to give identical statements on this aspect. In fact, there is no inconsistency between the two versions. At some point of time, the will may be in her hand and immediately before that or thereafter, by her side. It depends at which moment the witness noticed the will first. One may have noticed, while it was lying by her side and the other at the time when it was in her hand. So long the will, according to both, was with Chandanben, it makes little difference whether she was holding it in her hand or whether it was lying by her side, at the moment when they had entered her room. There is, therefore, no inconsistency, nor any suspicious circumstance in the matter, on this count.

14.3 Much criticism was levelled on the ground that at the time when the will was executed, it was tied up with a string along with the Schedule of property. The contention was that if the will was already tied up with a string at the time when Chandanben had put her initials on each page and the pages were not loose, on some of the pages initials would not have gone beneath the stitched portion and would have appeared in the margin. As noted above, the will is tied up with a pink ribbon, as also with a white string. There are pin-marks visible on the left corner of the pages of the will. The white string clearly suggests that it was applied after the certified extract of village form and the docket of Advocate, D.A. Mehta, were attached to the will, for the purpose of its presentation to the probate court, and it appears that because of the second stitching of the papers with this white string, part of the initials have come beneath the stitched portion on some pages. We do not find anything suspicious from this. Part of the initials only, which are on the even number of a few pages, seem to have got stitched at the time of applying the white thread with a view to attach the extract of the property register and the advocate's docket. After 10 or 11 years of passage of time, it would be difficult for any person to remember as to the exact manner in which the will was stiched. One thing that clearly transpires is that at the time when initials were put by Chandanben, the portions where

she had placed the initials were not within the stitched portion of the paper and that at the time when the seals were affixed by this witness, at most of the places they were affixed by putting them on the junction where the papers were stitched so as to have a common seal on two pages, just as he had put his signatures across the two pages at the centre. On the schedules and at the end of the Schedules, the witness had put his separate signature and seal, also. On going through the evidence of this witness Mahesh J.Shah, we find that there is absolutely no valid reason for not accepting his version as regards the execution of the will. He was clearly an attesting witness and from his deposition, we are satisfied that the requirements of Section 68 of the Evidence Act and Section 63 of the Succession Act are fully met with. We find ourselves in complete agreement with the trial court on its acceptance of the evidence of Maheshbhai J.Shah, as an attesting witness, who reliably proves the execution of the will, Ex.77.

15. It has come in evidence that Chimanlal Jivanlal, who was residing just adjoining to the house of Chandanben was bed-ridden, which has been stated by the defendant No.6, Shantilal (present respondent No.7), who was the cousin brother of the testatrix Chandanben. Obviously, therefore, Chimanlal Jivanlal could not have been called as a witness and no adverse inference can be drawn for his not having been called as witness.

16. We may now refer to the deposition witness, Dinesh Ramanlal Shah, Exh.81, who was working as a Manager in the Bank of India. He has stated that in 1966, he was functioning as an agent in the Raipur Chakla Branch of the bank and at that time he was fully acquainted with the specimen signatures of the testatrix Chandanben, who was having an account in that branch. He has proved the specimen signatures and initials of Chandanben, which were obtained by the bank in two cards for verification purposes, and both these cards were admitted in evidence at Exhs.83 and 84. This witness had put his initials on these cards against the specimen signatures of the said account holder. He has stated that the cheques were drawn largely by Chandanben till April or May 1967 and, he had passed the cheques for payment and that he was in a position to identify the signature of Chandanben Somnath, provided he had her specimen signatures on cards, Exhs.83,84, available for comparison. He was then shown the will Exh.77, and the signature of the textatrix at the foot of the page 19 and after comparing that signature with the specimen signatures on the cards, Exhs.83,84, as also the initials

on the pages of the will, this witness had deposed that the said initials and the signature were of Chandanben. This witness was clearly acquainted with the signature and initials of Chandanben, which appear on the cards Exhs.83 and 84, and he had ample opportunity in his capacity as the bank agent, who used to pass the cheques of Chandanben, to compare her signatures with the specimen signatures in these cards. In the cards, Exhs.83 and 84, we have seen the specimen signatures of Chandanben Somnath. We may note that these specimen signatures, which appear at four places in these two cards, have also an upward slant, like the signature which has been put on page 19 of the will. We, therefore, find that the trial Court was justified in holding that there was a natural upward slant in the signature of Chandanben. We, therefore, do not find anything suspicious from the upward slant, which appears in Chandanben's signature on page 19 of the will,Ex.77, and we hold that it is not indicative of any loss of control over one's self due to ill age or debility. There are also initials of Chandanben Somnath on these cards, Exhs.83 and 84, at two places and this witness has, by comparing these initials with initials on the will at Exh.19, clearly deposed that they are of Chandanben. On seeing these signatures and initials initials on the cards, Exhs.83 and 84, and the initials which appear on 19 pages of the will as well as the signature of the testator, we are of the view that the trial Court was right in relying upon this witness for holding that the signature and initials and the signature on the will, Exh.77, were of Chandanben Somnath, the testatrix. There was obviously less space left at the end of page 19 and the testatrix had to sign in whatever space was left on that page at the end of the will and she seems to have adjusted her signature in the available space. Slight change in alignment in the typed portion of the date which occurs almost at the end of the page could have occurred in normal circumstances in a traditional typewriter or due to the last portion of the page not being held securedly while typing or due to misalignment of letters or a faulty stroke. There is absolutely no reason to infer either from the nature of typing or from the signature of the testatrix that signature already obtained was used for preparing the will. The above positive evidence and initials of the testatrix on nineteen pages, including on this page 19, as also the additional initials against two corrections leave no scope for any such wild conjectures.

17.1 From the deposition of witness, Kesuprasad Jani, and Maheshbhai J.Shah, the attesting witness, as also

from the statements given on oath by the attesting witnesses before the Sub Registrar, which are attached with the will, it is clear that witness, Chandulal Jagannath Raval, was also present and had signed as an attesting witness. While the trial Court has for good reasons stated that it would not discard Chandulal's evidence, it threw itself in a doubt, in view of discrepancy as regards the overwriting of the name "Chandulal" in his signature, which appears on page 19 of the will, while signing it as the second attesting witness. The trial Court doubted his signature because he was unable to correctly explain the overwriting. He was giving evidence after about 10 to 11 years and it is clear from his deposition Exh.76 that at the time when he was asked about the overwriting, there was no enlargement of the signature available, nor was he pointedly shown the overwriting, when the question was asked. He, therefore, just having noticed some overwriting in his signature, which was not easily discernible in a sweeping look at the original will, which was shown to him in his examination-in-chief, offered a mundane explanation that it was due to faulty pen. During the arguments, it appears that the enlargement of his signature on the will (Ex.119) was made available to the Court, from which it could be seen that below the name "Chandulal" there was earlier "Chimanlal" written. In view of this being noticed, an effort was made by the learned Counsel for the propounders to recall this witness, Chandulal, but that was turned down. It was suggested that the overwriting over the name "Chiman" of the name "Chandulal" had happened because at that place the witness Chimanlal Jivanlal, who had first signed the will had commenced writing his name for the purpose of his signature, but he had then shifted to the space above that place, where he could put his signature and leave some space for the signature of the second attesting witness, Chandulal Jagannath. The trial Court took this suggestion as a flight of the imagination of the learned Advocate, D.A. Mehta, and on the basis of the handy answer given by Chandulal in his deposition that the overwriting was due to faulty pen and that he had not written the name "Chimanlal", branded that explanation as regards the overwriting as false, though the trial Court hastened to add that it did not mean to say that the rest of his evidence was false. The trial Court made it clear that all it wanted to say was that it was not safe to rely upon Chandulal's signature as attesting signature. The deposition of Chandulal supports the propounder's version on all counts. He has in his deposition, Exh.76, stated that he was working as a poojari of Kamnath Mahadev temple since about 35 years and he knew deceased

Chandanben since his studentship days because she never used to visit the temple. He had last seen her on 6.5.1967. She used to come to the temple on foot between 9.00 and 10.00 a.m. and used to even sit with him for a few minutes, during which she would speak to him about religion, as also about her domestic matters. He has stated that he had come to know that lately her relations with Janardhan had deteriorated. He had found her in a perfectly good physical as well as mental health till the last and, according to him, she used to manage the affairs of her estate herself. He has stated that he had gone to her residence on 1.5.1967, in connection with the attestation of her will. Her Munim Natvarlal had met him at the entrance of the street and conveyed to him that Chandanben had summoned him. This shows that Chandanben had not asked her Munim to call any two persons, but she had indicated as to who should be called. He has stated that when he reached the house of Chandanben, Chimanlal, i.e. the other attesting witness had also arrived and both of them went upstairs. He has stated that Chimanlal was residing in the neighbourhood of Chandanben. When they went in the room of Chandanben, Kesuprasad and Maheshbhai were also present and at that time the document was with Maheshbhai. Chandanben asked him to read it over to her and he read the will in presence of all of them in its entirety, including the particulars of the property. Chandanben, on being asked by Maheshbhai, affirmed that the will was written as per her desire and instructions. Thereafter, she signed it. Chimanlal attested the will first and then this witness attested it. After they had put their attestation, Maheshbhai, the Justice of the Peace, had signed it. He has stated that Maheshbhai had put his signature and seals on the will. At that time, Chandanben was perfectly able to understand what she was doing and was in a fit condition of mental and physical health. He has also stated that Chandanben had put her initials, which appear upto page 19 of the will. He had witnessed all these initials and signature of Chandanben, which were put during his presence. The will came to be exhibited in the deposition of this witness. He has also deposed that Maheshbhai had put his signature and seals in his presence till the last page of the Schedule. He has also stated that statements of Maheshbhai, Chimanlal and this witness were recorded on the will by the Sub-Registrar and he has identified the signatures made in those statements, which we have already referred to hereinabove. It was sought to be contended that this witness was an interested person, because for the purpose of his profession as an astrologer, he used to have his office in the Kamnath Temple-premises, for which he did

not pay any rent. This witness, admittedly, was a poojari of Kamnath Mahadev temple, which was run by the Somnath Trust and he knew Chandanben since more than 3 decades. He has not been given any benefit under the will and he was utilising the precincts of the temple for the purpose of his profession as an astrologer, which would surely thrive in such surroundings. It can, however, never be inferred from this that he was out to support the propounders in putting up any fabricated will. One more criticism that was levelled against this witness was that in his initial affidavit, which was filed with the probate application, he had, while mentioning the names of other persons who were present, i.e. Kesuprasad Jani, Maheshbhai J.Shah, the Justice of the Peace, Chimanlal Jivanlal, the first attesting witness and himself, had also referred to the propounder Ambalal's presence. During the arguments, when this was pointed out to falsify Kesuprasad Jani, who had deposed that there was none else present except these four persons and Chandulal when the will was executed, an attempt seems to have been made by the learned Advocate for the propounders to recall this witness to explain this discrepancy by stating that it was a drafting-mistake on the part of the learned Advocate, Mr.D.A. Mehta, as a result of which the name Ambalal also came to be included and that since the witness did not know English and substance of the affidavit was narrated to him, he did not grasp the significance of the name "Ambalal" and allowed it to be there since Ambalal was also one of the executors. It appears that the request to recall the witness was not granted. It will be noted that when this witness was confronted with his affidavit, Exh.4 of Misc. Civil Application No.552 of 1970, in paragraph 4 of his deposition, it was not specifically pointed out to him that the name "Ambalal" was also included in the names given in the application, as the person who were present when the will was executed. He was generally asked whether this affidavit was sworn by him. When asked, he had said that he did not know if in the affidavit it was stated that at the time of the will, amongst the persons present, Ambalal Himatlal and other persons too were present. Under Section 145 of the Evidence Act, when it is intended to contradict a witness by previous statement made by him in writing, his attention must, before the writing can be proved, be called to those parts of it, which are to be proved for the purpose of contradicting him. The specific part of that affidavit, which constituted his prior statement in writing, was not put to this witness. Apart from this technical aspect, we are of the view that if Ambalal was really present at the time of the

execution of the will, there was no need at all for the propounder, Kesuprasad Jani or Maheshbhai J.Shah, Justice of the Peace, to state that no other person, except these two witnesses and the attesting witnesses, Chimanlal and Chandulal, was present when the will was executed by Chandanben. Ambalal has joined as a co-applicant, being one of the executors under the will, for obtaining the probate and it is not as if he had taken any different stand. We are, therefore, not inclined to view reference to Ambalal, even if it is made in the affidavit of this witnes which was filed along with the probate application, with any suspicion, that can have even a remote bearing on the question of execution of the will.

17.2 It is significant to note that Chandulal has admitted the overwriting of his name. He has clearly stated that he had put the signature, which reads "Raval Chandulal Jagannath", while signing as an attesting witness. His presence is amply established. He has denied the suggestion that he had first written the name "Chimanlal" over which he wrote "Chandulal". It would ordinarily not happen that a person would write some one else's name, while wanting to write his own. As noted above, this witness was not shown the overwriting, when cross-examined on this point, and the enlargements of his signature, which are at Exh.119, were not available at the time when he was examined because these were prepared much later after the evidence was recorded, as it transpires from the Rojnama of the case. There is sometimes great difficulty in deciphering words which are overwritten. In order that the overwritten word may be "apparent", it must be capable of being read by looking at the document itself even closer to the light. Enlargement of such writing would, however, be by a process involving creation of a new document, i.e. the enlarged photograph, because the words overwritten can be read. Therefore, the enlargement on which reliance was placed, ought to have been shown to the witness because without such enlargement, the writing below the overwritten name of this witness was not apparent.

17.3 From a bare look at the original will, Exh.77, of his signature, it can be seen only as an overwriting and it was not easily noticeable that his name Chandulal was written over the name "Chimanlal". After so many years, he could never have remembered as to how the overwriting came about. He maintains that the signature was put by him. In our view, mere overwriting of the first name in full signature would not vitiate the signature, if the signature is proved to have been put by the person concerned. There was no suggestion put to him that his

signature "Raval" and his father's name "Jagannath", which are admittedly not overwritten, were not in his handwriting or that they were written by his brother whose name was also Chimanlal. In view of the positive evidence about his presence, even if he had overwritten on the name "Chimanlal", his own name "Chandulal" while putting his signature, when there was hardly any other space available for putting his signature, that would not reduce the evidentiary value of his signature as an attesting signature. Chimanlal Jivanlal had attested the will first, as is clear from the evidence and it seems obvious that he started signing his name by writing "Chimanlal" and then shifted to the higher place to keep the lower space for the signature of this second attesting witness. There was just enough space for the signature of the second attesting witness, who could not have avoided overwriting while putting his signature, after Chimanlal Jivanlal had attested the will. It is obvious that this witness Chandulal could never have written his name as "Chimanlal" and overwritten it by his own name "Chandulal". It is more likely that the other witness Chimanlal had written it, over which the overwriting of the name of this witness occurs. There is absolutely no basis for inferring that the brother of this witness whose name was also Chimanlal, had written the name, nor was it specifically so suggested to this witness in his cross-examination. We are convinced that the signature, which reads "Raval Chandulal Jagannath", has been put by this witness, and notwithstanding his lack of memory over a long span of 11 years as to how the overwriting occurred in his name and his abrupt oral explanation given, without noticing the nature of that overwriting and referring the document, that it was due to faulty pen that it had occurred, we are satisfied from the evidence on record that it was this witness who had put the said signature as the second attesting witness in the will. There was absolutely no possibility of anyone else having overwritten this witness's signature, or anyone else having signed for him. The evidence of this witness also, therefore, supports the execution of the will by the testatrix.

18. Thus, the execution of the will, Exh.77, by the testatrix is satisfactorily proved in accordance with the provisions of Section 63 of the Indian Succession Act read with Section 68 of the Evidence Act. Even if, for the sake of argument Chandulal's deposition is not taken into account as an attesting witness, Maheshbhai J.Shah, the Justice of the Peace, was clearly an attesting witness, whose evidence established that the will was duly executed by the testatrix in presence of the

attesting witnesses, Chimanlal Jivanlal and Chandulal Jagannath. Chimanlal Jivanlal was bed-ridden and could not have appeared for giving evidence. Since the Justice of the Peace, Maheshbhai J.Shah, was also one of the attesting witnesses, who had proved the fact that Chimanlal Jivanlal had signed as an attesting witness, no adverse inference can be drawn from the fact that the deposition of Chimanlal Jivanlal was not recorded by issuing a commission, for which the propounders could have applied. We are clearly of the view that not only the execution of the will stands validly established from the deposition of Kesuprasad Jani and Maheshbhai J.Shah, the Justice of the Peace, as well as from the nature of the will and the statements recorded on oath by the Sub Registrar on the will, even Chandulal Jagannath's deposition clearly supports the fact that the will was duly executed.

19. There is consistent evidence of the witnesses that the testatrix was in a fit state of mind and body to make the will and we have no reason to doubt these persons, who knew her well. The testator, when there is no suggestion of insanity, is presumed to have remained sane. Unsoundness of mind occasioned by physical infirmity or advancing years and the resulting defect of intelligence may be a cause of incapacity, but the intelligence must be reduced to such an extent that the person afflicted, i.e. the proposed testator, does not appreciate the testatory act in all its bearings. There must be some reliable evidence of mental incapacity. The testator must understand that he is giving his property to one or more objects of his regard and he must be in a position to understand and recollect the extent of his property, as also the nature of the claims of the concerned persons, who are included or excluded from his will. While executing the will, he must be aware that he is making a disposition and that on his death, the property would devolve as mentioned in the will. From the evidence on record, we are not only satisfied that the testatrix was in good health and that she used to regularly visit temple, we are also fully satisfied that she was in total command of the situation and had made the will after due deliberation. From the tenor of the will, it is clear that she did not miss any important aspect and was also aware of the manner in which she was requiring her properties to be dealt with. Several particulars, which we have narrated while referring to the will, could never have been incorporated without her active instructions and understanding. She was a managing trustee in various trusts, as admitted by her stepson, Janardhan in paragraph 6 of his deposition,

Exh.103, wherein he states that Chandanben was the Managing Trustee in all her public trusts. Earlier, he has referred to various public and private trusts which were created by his stepmother, Chandanben. He has stated in his deposition that both his sisters, Premila and Manorama, were got married by his stepmother, Chandanben, who had incurred all the expenses. He has stated that the temple, Kamnath Mahadev, was constructed by Chandanben's father, i.e. his grandfather, and a charitable dispensary was being run therein by a public trust created by Chandanben. Janardhan got married in 1962 and shifted to Shahibaug residence in 1964. He had last gone to Chandanben's house on the date on which she expired, as stated by him. He has admitted that Chandanben created two private trusts for the benefit of his sisters. He has, in terms, admitted that Chandanben was controlling his bank account and that even the cheque books and pass books did not remain with him, but they remained with the Munim of Chandanben. He has also admitted that Chandanben used to sign the papers in connection with the bank account, money deposits with companies, etc. and that she had last signed such papers a week before her death. What more evidence is required for vouchsafing the sterling state of mind of this grand old lady, who was fully in command of her estate and did exactly what she had desired by making detailed provisions regarding her property, which she declared to be disposed of after her death, under the will, Exh.77? There is evidence on record to show that Janardhan ill-treated her in her last days and their relations were strained for nearly a year prior to the making of the will. Despite that, she did not choose to wholly disinherit Janardhan, which reflects her nobility. The property, which had devolved on her from her husband's side, she did bequeath under the will to Janardhan, which fact is hardly noticed during the trial-proceedings. It is only when the will was being analysed before this Court that it came to the fore that Janardhan was also given valuable property under the will. The properties, which she had received from her father, have been dealt with separately and sensibly, in keeping up with the desires which were expressed by her father in his will of 1928 and there is much common in thinking of the daughter and her father, if we see the nature of the will, which was executed by her father, as also the deeds creating public trusts, which documents are at Exhs.64,65 and 66. The will Ex.77 is rational on the face of it and has been duly executed. The evidence of the usual habits and course of life is of greater weight in absence of any reliable evidence of mental incapacity, and we are satisfied from the evidence on record as to the usual

habits and course of life of the testatrix and the nature of the will and the manner of its execution that it has been duly executed, meriting the probate at the instance of the executors.

20. The contention that the fact that the will was not got registered during the lifetime of Chandanben should be taken as a suspicious circumstance, as also the fact that it was presented by the propounders for registration after her death, which registration was not compulsory, has no merit. Presentation of the will, after the testatrix's death for registration by itself cannot be treated as a suspicious circumstance, because such presentation of the will by the executors is a statutorily recognised process, as can be seen from the provisions of Section 41(2) of the Registration Act. Section 41(2) of the Registration Act, 1908, inter alia, provides that a will presented for registration by a person other than the testator, who is entitled to present it, shall be registered, if the registering officer is satisfied that the will was executed by the testator, who is dead, and that the person presenting the will is, under Section 40, entitled to present the same. Under Section 40(1), the testator, or, after his death, any person claiming as executor or otherwise under a will, may present the will to any Registrar or Sub-Registrar for registration. In view of this statutory procedure enabling the executor to present the will for registration after the death of the testator, presentation of such will by the executor for its registration, after the death of the testatrix can never, by itself, be regarded as a suspicious circumstance in the matter of the execution of the will and no adverse inference can be drawn against the propounders, as is sought to be suggested on behalf of the appellants on that count. From the narration of the earlier registered wills, which have been revoked, made in the will, Exh.77, it is clear that the testatrix did not get the wills registered immediately on their execution and there was a time-lag of about a month in registering the will dated 19.9.1950, and over five months in getting the will dated 24.7.1951 registered; though, of course, the will dated 14.3.1955 was registered within three or four days, as stated in the first paragraph of the will, Exh.77. In the present case, the Providence, however, did not leave sufficient time for her to get her will registered during her lifetime and she passed away within a week of the execution of the will. No adverse inference can be drawn from that fact, nor can it be said to be a circumstance creating a suspicion regarding the execution of the will.

21.1 The contention that the testatrix had not read the will was canvassed on the basis that had she read the will, there was no need for her to ask Maheshbhai J.Shah, the Justice of the Peace, to read it over again to her in presence of the attesting witnesses. From the fact that she asked the Justice of the Peace, Maheshbhai J.Shah, to read over the will in presence of the attesting witnesses, it can never be inferred that she had not earlier read the will. She was already having the final will, which was to be executed, and merely because it was read over again at her instance before the actual execution of the will by her in presence of the attesting witnesses, it can never be inferred that there existed any suspicious circumstance on that count. The Justice of the Peace, Maheshbhai J.Shah, was required under the circular issued by the Government, to have personal knowledge of the matter, as is clear from clause (3) of the Circular dated 21.3.1963, which is reproduced hereunder:-

> "(iii) A Justice of the Peace should not attest, verify or authenticate any document and affix his seal thereon, unless he has personal knowledge of the matter to which the document relates, and the parties bringing the document are sufficiently known to him."

21.2 Therefore, in the process of attesting the document, if the said Justice of the Peace had read over the document at the instance of the testatrix, it was a normal thing to do before attesting, verifying or authenticating such document and points more in the direction of the genuineness of the execution procedure, rather than existence of any suspicious circumstance. In fact, the conduct of the testatrix of asking her Munim Natvarlal to call two attesting witnesses and asking Maheshbhai to read the will after the attesting witnesses arrived, clearly shows that she was fully aware of the contents of the will and she knew that there was no change to be made in the will, which was finally prepared.

22. The contention that there is blank space on page 8 of the will after the word "para" and such blank space in the will created a suspicion as to its execution because a testatrix so meticulous as Chandanben would not have allowed that space to remain blank, is without merit. The sentence in which some spacing appears after the word "para" is to the effect that the properties mentioned in Schedule 'A' should be given, as stated in the following para. It can be seen that immediately

after the end of the para in which the sentence occurs, there is a sub-para following, which is numbered "1", in which detailed instructions are given as to what amount should be spent on the death anniversary and 'Sharadh' days of the testatrix, her parents and grandparents. Therefore, no suspicious circumstance arises from some blank space which appears after the words "Niche para" and before the words "Ma Janavya Pramane Apvi". On the reading of the will, the said space does not appear to be a blank kept in the will. A will is not invalid by reason of a blank space being left in it. Any difficulty which may arise by reason of the blank or any similar error can be determined by the court of construction. We do not find any suspicious circumstance in the matter of the execution of the will from the said blank space pointed out on page 8 of the will.

23.1 It was sought to be contended that there is reference to the immoveable property at the end of Schedule 'A' attached to the will, which property was acquired by Chandanben somewhere in the year 1940 and could not have been given to her by her father and therefore it should be inferred that the Schedules, which did not bear the initials of Chandanben were not in existence at the time when the will was allegedly executed. As noted above, the said immoveable property mentioned at the end of Schedule 'A' of survey No.68, 68-D, being bungalow known as "Chandan Bhuvan", is also mentioned in the body of the will itself on page 10. Thus, there is intrinsic evidence in the body of the will to the effect that the said immoveable property is mentioned in Schedule 'A'. All the three Schedules were to be treated as part of the will and no adverse inference can be drawn from the fact that the Schedules were not initialled by Chandanben. The Justice of the Peace had, while attesting the will, put his signatures and seals on all the pages of these Schedules also. From the evidence on record, we are fully satisfied that these Schedules were part of the will and existed when it was executed.

23.2 It was contended that the said immoveable property mentioned in Schedule 'A' was acquired under a document executed in the year 1940. An application, being Civil Application No.10823 of 1998, was made purporting to be an application under Order 41, R.27 of the Code of Civil Procedure, during the arguments in this appeal, by which permission was sought by the appellants to produce on record a copy of the registered sale deed dated 14.10.1940, and the application was objected to by the other side by an endorsement made thereon. Under

Order 41, R.27 of the Code of Civil Procedure, 1908, the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, except where the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed. These requirements are not at all satisfied. Even apart from this, this Court does not require the document to be produced, as it is not required for the pronouncement of the judgment or any other substantial cause, envisaged by clause (b) of sub-rule (1) of Rule 27 of Order 41 of the Code of Civil Procedure.

23.3 The probate Court is not a court of construction and cannot embark upon inquiry as to when the property mentioned in the will was acquired and as to what is the effect of inclusion of that property at a particular place in the will. It would not be competent for the probate Court to determine the question as to whether the testator acquired the power to dispose of the property, which he purports to dispose of by his will. The only question which the court of probate has to determine is as to whether the document sought to be probated did in fact dispose of the property. The functions of the probate Court are to ascertain whether the will in question is lawfully executed by the testator in a sound disposing state of mind, without coercion or undue influence and that it has been duly attested by the witnesses, as required by law. The probate Court is required to determine whether the document is of testamentory nature and whether the executors applying for the probate are entitled to be constituted the legal representatives of the deceased. The primary function of the probate Court is to deal with the factum and due execution of the will, and it would not go into the question of validity of the provisions of the will. A court of probate will construe the will, so far as necessary, to determine what documents should be admitted to probate and to whom administration should be granted. Therefore, no additional evidence in the nature of a document executed in 1940 to show as to when the testator acquired the said immoveable property mentioned in Schedule 'A' is required for the purpose of deciding the question whether probate of the will has been rightly granted by the trial Court or not. We, therefore, reject Civil Application No.10823 of 1998 by which the

applicants-appellants sought permission to produce on record copy of registered sale deed dated 14.10.1940.

24. In view of what we have said hereinabove, we are unable to accept the contentions raised on behalf of the appellants, and hold that the will, Exh.77, was duly executed by the testatrix and is a perfectly legal and valid will, in respect of which the trial Court was right in granting probate to the executors. We, therefore, uphold the judgment and order of the trial Court. This appeal is, therefore, dismissed. The appellants to pay the costs of the respondents Nos.1/1, 1/2, 1/3 and the respondent No.2. There shall be no order as to costs, as regards the rest of the respondents.

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